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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~258~~. 21.

THE NEW YORK FOUNDLING HOSPITAL, APPELLANT,

vs.

JOHN C. GATTI.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED MAY 10, 1905.

(19,755.)

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a In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

Transcript on Appeal

1 In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

To the Honorable The Supreme Court of the Territory of Arizona:

Now comes the New York Foundling Hospital and makes petition to this Honorable Court, and alleges and avers:

I.

That the petitioner is a corporation organized and existing under the laws of the state of New York.

II.

That under and by virtue of an act of the people of the state of New York represented in senate and assembly, passed May 11, 1872, entitled "An Act to amend the Charter of the Foundling Asylum of the Sisters of Charity in the city of New York," and being known as Chapter 635 of the laws of 1872, of the state of New York, the petitioner was duly authorized and empowered to receive and keep under its care, charge, custody and management children of the age of two years or under, found in the city of New York, abandoned or deserted or left with petitioner, and to keep such
2 children during their infancy.

III.

That on the 4″ day of October, 1901, in pursuance and by virtue of the said act, the petitioner in the city of New York received and took under its care, charge, custody and management a certain child named William Norton, the said child having been born on the said 4″ day of October, 1901, and being on said day abandoned and deserted and left in the custody and charge of this petitioner.

IV.

That the petitioner from the said 4″ day of October, 1901, until the 2d day of October, 1904, kept the said child William Norton under its care, charge, custody and management.

That on or about the 1″ day of October, 1904, the petitioner in the exercise of its care, charge, custody and management of the said child William Norton, placed the said child in the home of a certain person in the town of Clifton, county of Graham, Territory of Ari-

zona, to be held and cared for by the said person in said home temporarily, and at all times subject to the supervision of the petitioner and its officers and agents; and that at such time the petitioner had officers and agents of trained experience at the town of Clifton with instructions to supervise the said child and the care and management of it while temporarily in the charge and care of the said person as aforesaid; that at all times the petitioner had the right
3 at will to withdraw the said child from the care and charge of the said person and retain the custody thereof, and to assume the custody thereof, and to continue to keep the said child in pursuance of law under its care, charge, custody and management during the term of its infancy as aforesaid.

V.

Upon information and belief that thereafter, and on or about the 2d day of October, 1904, one John C. Gatti residing at the said town of Clifton, his servants and employes, unlawfully and with force and violence entered into the house of the said person where at the time of said unlawful entrance the said child William Norton was, having been placed there as aforesaid, and forcibly, unlawfully and without right took possession of the said William Norton and removed him thence to the custody of the said John C. Gatti. That the said child has ever since said day been in the custody and under the control of the said Gatti, and that the said child is now restrained of its liberty by the said Gatti without the consent or license of the petitioner and against its desire, intention and protest, and in violation of its rights under the laws of the state of New York, of the United States and of this Territory.

Wherefore, the petitioner demands that the writ of this Honorable Court issue, directed to the said John Gatti, commanding him to have the body of the said child William Norton in the court
4 room in the city of Phœnix, county of Maricopa, Territory of Arizona, at the opening of the term of this Honorable Court, on the 9" day of January, 1905, to do and receive what shall then and there be considered concerning the said child William Norton.

EUG. S. IVES,
THOS. D. BENNETT,
Attorneys for Petitioner.

TERRITORY OF ARIZONA, *County of Pima, ss:*

Thomas D. Bennett and Eugene S. Ives being duly sworn, depose and say, and each for himself deposes and says: that they are the attorneys for the New York Foundling Hospital the petitioner in the foregoing petition, and have signed the said petition in behalf of the said New York Foundling Hospital; that they have, and each of them has read the foregoing petition, and that they know the contents thereof, and that the same is true to the knowledge of both of them except as to the matters therein stated to be alleged on in-

formation and belief, and as to those matters each of them believes it to be true.

EUG. S. IVES.
THOS. D. BENNETT.

Subscribed and sworn to before me this 31" day of December, 1904.

My commission expires May 29, 1907.

[SEAL.] JOSIE B. HENDERSON,
Notary Public in and for Pima County, Territory of Arizona.

5 Let the writ issue returnable Jany. 9th, 1905, as prayed for in the foregoing petition.

Dated at Tucson, Ariz. this 1st day of January, 1905.

GEO. R. DAVIS,
Associate Justice.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. William Norton—John C. Gatti. Filed Jan. 2, 1905. S. M. Cullom, clerk.

6 In the Supreme Court of the Territory of Arizona.

Subpœna.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

The Territory of Arizona sends Greeting to A. E. Hobbs:

You are commanded that all and singular business and excuses being laid aside, you appear and attend before the Supreme Court of the Territory of Arizona, at Phœnix, at a term of said Court to be held at the Court House in said City, on the 9th day of January, 1905, at 10 o'clock A. M., then and there to testify in the above entitled action now pending in said Supreme Court, on the part of the Petitioner and disobedience will be punished as a contempt, by the said Court, and you will also forfeit to the party aggrieved the sum of One Hundred Dollars and all damages which may be sustained by your failure to attend.

Witness my hand and seal of said Court, this 4th day of January, 1904.

[SEAL.] S. M. CULLOM, *Clerk.*

I hereby certify that I received the within Subpœna on the 4th day of January, at 11:45, A. M. and made due service thereof
7 by reading the same to A. E. Hobbs, and leaving with him a copy of same, he being the party named therein, on the 4th day of January, 1905, at 4 o'clock, P. M. at Phœnix, Arizona.

J. ELLIOTT WALKER,
Sheriff of Maricopa County, Arizona,
By W. W. CUNNINGHAM,
Deputy Sheriff.

(Endorsed:) No. 202. In the Supreme Court of the Territory of Arizona. Subpœna. Received date Jan. 4, 1905, at 11:45 A. M. Filed Jan. 5, 1905. S. M. Cullom, clerk.

8 In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

In the name of the Territory of Arizona, to John C. Gatti, Resident at Clifton, Arizona:

We command you That you have the body of William Norton by you detained and restrained of his liberty, as it is said, together with the time and cause of such restraint and detention, by whatever name the said —— —— shall be called or charged, before our Justices of our Supreme Court at Phoenix, Maricopa County, Arizona Territory, at the hour of 10 o'clock A. M. on the 9″ day of January, 1905, to do and receive what shall then and there be considered concerning the said William Norton, and have you then there this writ.

Witness the Honorable Geo. R. Davis Associate Justice of the Supreme Court of the Territory of Arizona, and the seal of said court hereto affixed this first day of January, 1905.

[SEAL.] S. M. CULLOM,
Clerk of the Supreme Court.

9 In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

TERRITORY OF ARIZONA, *County of Graham, ss:*

I hereby certify that on the 4 day of January, 1905, I served the writ of Habeas Corpus in the above entitled matter (a copy of which is hereto annexed) upon said J. C. Gatti by delivering said writ to him personally at Clifton, Graham County, Arizona.

Dated January 6, 1905.

JAMES V. PARKS,
Sheriff of Graham County.
By JOHN D. PARKS, *Deputy.*

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. Writ. Filed Jan. 9, 1905. S. M. Cullom, Clerk.

10 In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

Comes now John C. Gatti, respondent herein, and moves the Court to quash the writ of *habeas corpus,* herein, and shows to the Court:

I.

That the petition upon which said writ was issued does not show any right or power in the petitioner to be the guardian of, or to have the care, charge, custody or control of a minor child in the Territory of Arizona.

II.

That the said petition shows upon its face that the petitioner had released the said minor child, William Norton, from its possession, custody and control at the time the said minor child is alleged in said petition to have come under the control of this respondent.

III.

That the said petition does not show any right in the petitioner to have the care, custody or control of the minor child, William Norton, named in said petition.

11

IV.

That the said petition does not state facts sufficient to show a right in the petitioner to the writ of *habeas corpus*.

Wherefore: This respondent prays that the writ of *habeas corpus* herein be quashed.

W. C. McFARLAND AND
BENNETT & BENNETT,
Att'ys for Respondent.

In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL for a Writ of *Habeas Corpus*.

Comes now the respondent and shows to the Court that the petitioner has no right to maintain or prosecute this action, for the reason that it appears upon the face of the petitioner's petition that petitioner is a foreign corporation; and respondent alleges that petitioner has not filed a copy of its articles of incorporation or charter or the appointment of an agent resident within this territory upon whom process may be served, with the Auditor of the Territory of Arizona, as provided in Chapter IX of the Revised Statutes of Arizona and the amendments thereto.

12

W. C. McFARLAND AND
BENNETT & BENNETT.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

John C. Gatti, being first duly sworn, on oath says: That he is the respondent named in the above-entitled matter; that he has read he above and foregoing pleading, and knows the contents thereof and that the same is true of his own knowledge, except as to those matters

therein stated on information and belief, and as to them, he believes it to be true.

JOHN C. GATTI.

Subscribed and sworn to before me this 10th day of Jan., 1905.

M. W. LORAINE,

[SEAL.] *Notary Public.*

My commission expires on Jan. 29, 1907.

13 In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

Comes now the respondent herein, John C. Gatti, and in obedience to the writ of *habeas corpus* herein, brings the said William Norton into this Court and says, that the said William Norton is in no manner, without right, confined, imprisoned, restrained, or deprived of his liberty, and further alleges:

I.

That on the 21st day of October, 1904, the said William Norton was an inhabitant and resident of Graham County, Arizona, and was a minor under the age of 21 years, to-wit, of the age of two years, and has no guardian legally appointed by will or deed or otherwise. That on the day last aforesaid respondent, being a resident of said Graham County, and a fit and proper person to be the guardian of said minor, made application to the said Probate Court of said County to be appointed the guardian of the person of said minor. That the petitioner thereupon appeared in said Probate Court and filed its answer to said application and resisted the same. That thereupon such proceedings were had in said court in said cause that on the 16th
14 day of November, 1904, an order was entered in said court in said cause appointing this respondent guardian of the person of said minor, and directing that letters of guardianship of the person of said minor be issued out of said court to this respondent; that thereupon letters of guardianship of the person of said minor were issued out of said court to this respondent, copy of which said order and letters of guardianship is hereto attached, marked "Exhibit A." That thereupon this respondent duly qualified as such guardian by taking the oath prescribed by law and giving the bond required by said order; and thereupon this respondent became and was, and now is, the legally appointed and acting guardian of said minor in this territory; and that ever since the said appointment the said minor has been and now is in the care, custody and control of this respondent by virtue of said letters of guardianship aforesaid.

Respondent further shows to the Court that after the entry of the order aforesaid and after this issuance of the letters of guardianship aforesaid, the petitioner herein gave written notice of its appeal from

said order, and did appeal therefrom to the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Graham, a copy of which notice and appeal is hereto attached, marked "Exhibit B." And that said appeal is now pending in said last-mentioned court and is undetermined.

Wherefore: This respondent shows that this court has no
15 jurisdiction in this proceeding to determine the right of this respondent to be the guardian of the person of said minor.

II.

Respondent further answering said petition upon which the Writ of *Habeas Corpus* herein was issued, shows to the Court: That the said minor, William Norton, is a white Caucasian child of the Anglo-Saxon race; that on or about the first day of October 1904, the petitioner brought the said child to the Territory of Arizona and abandoned him to the keeping of a Mexican-Indian, whose name is unknown to respondent, but who was and is financially unable properly to feed, clothe, shelter, maintain and educate said child, and who was otherwise by reason of his race, mode of living, habits, and education, entirely unfit to have the care, control and education of said minor. That upon proper representation of the above facts to the said person to whom petitioner had abandoned said child as aforesaid, the said child was by him voluntarily surrendered and thereafter the said child was placed in the care, custody and control of respondent by the persons to whom it had been so voluntarily surrendered.

And this respondent shows to the Court that he is a fit and proper person to have the care, custody and control and maintenance and education of said minor. That he has taken said minor into his home as a member of his family and that said minor is being well cared for and is healthy, happy, and contented, and that it is the purpose and intention of respondent to rear, maintain, edu-
16 cate and provide for said child in all things as though it were his own child.

III.

And this respondent further answering the petition for said Writ denies that this respondent or his servants or employees unlawfully or with force or violence entered into the house of any person in whose charge the said minor child had been placed by petitioners, and denies that respondent forcibly, unlawfully, or without right, took possession of said child; and denies that said child is now restrained of its liberty against the laws of the United States, or of the State of New York or of this Territory.

And this respondent, further answering, denies that petitioner has any right to the care, custody and control of the said minor child, William Norton, in this Territory, and alleges that if it ever had such right, it has waived, forfeited and abandoned the same.

Wherefore, this respondent having fully answered all the allegations of said petition, prays to be hence dismissed with his costs.

TERRITORY OF ARIZONA, *County of Maricopa:*

John C. Gatti, being first duly sworn, on his oath deposes
17 and says: That he is the respondent in the above entitled matter; that he has read the above and foregoing Return to the Writ of *Habeas Corpus* of New York Foundling Hospital, and knows the contents thereof; and that the same are true of his own knowledge, except as to the matters therein stated on information and belief and as to those he believes it to be true.

JOHN C. GATTI.

Subscribed and sworn to before me this 10th day of Jan., 1905.
[SEAL.] M. W. LORAINE,
Notary Public.

My commission expires Jan. 29 / 07.

EXHIBIT "A."

Order Appointing Guardian.

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the person of WILLIAM NORTON, a Minor.

The petition of John C. Gatti for the appointment of himself as the guardian of the person of said minor, coming on regularly this day to be heard, and upon due proof to the satisfaction of said Court: That due and legal notice has been given of the hearing of said petition; that said minor is a resident of Clifton, County of Graham, and has no legally appointed guardian of its person; that said minor is an abandoned child, and is in need of nurture, care and education; that
said minor is in need of the appointment of a guardian of its
18 person; and that John C. Gatti is a fit and proper person to be appointed guardian of the person of said minor; and the person now having the care of said minor having duly appeared in this proceeding; and the New York Foundling Hospital, a corporation organized and existing under the laws of the State of New York, having also appeared herein by its attorneys, Bennett & Williams, and having filed herein its objection to the appointment of said petitioner as guardian of the person of said minor, and praying in said objection, for the care, custody and control of said minor; And the matter having been submitted for decision, and it appearing to the Court from all the evidence produced that it is to the best interest of said minor in respect to its temporal and its mental and moral welfare that the prayer of said The New York Foundling Hospital should be denied, and that the prayer of said petitioner should be granted:

It is, therefore, hereby ordered and adjudged that the prayer of the New York Foundling Hospital for the care, custody and control of said minor be and the same is hereby denied.

And it is hereby further ordered and adjudged that said John C.

Gatti be and he is hereby appointed guardian of the person of said minor, and that Letters of Guardianship of the person of said minor be issued to him upon his giving bond to William Norton, said minor, in the penal sum of Three Hundred Dollars, and upon his taking and subscribing an oath according to law;

19 And it is further ordered and adjudged (the said John C. Gatti having consented thereto in open court) that it shall be obligatory upon said guardian, John C. Gatti, to provide, at his own expense, proper food, clothing, shelter, care and medical attention for said minor at all times during said guardianship, and shall educate and care for said minor in a proper manner; and that the performance of the foregoing obligations and conditions is hereby made a part of the duties of said guardian, for the faithful performance of which he and the sureties on his bond are responsible.

Dated November 16, A. D., 1904.

P. C. LITTLE,
Judge of the Probate Court.

Endorsed as follows: No. 350. Filed November 16, 1904, P. C. Little, Clerk. Recorded in Min. Book 4, at page 240.

20 *Letters of Guardianship.*

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

TERRITORY OF ARIZONA, *County of Graham, ss:*

John C. Gatti is hereby appointed Guardian of the Person of William Norton, a minor.

Witness, P. C. Little, Clerk of the Probate Court of the County of Graham, Territory of Arizona, with the Seal of said Court affixed, this 18th day of November, A. D., 1904.

By order of the Court,

P. C. LITTLE, *Clerk.*

TERRITORY OF ARIZONA, *County of Graham, ss:*

I do solemnly swear that I will support the Constitution of the United States, and the Laws of the Territory of Arizona, and that I will faithfully perform, according to law, the duties of Guardian of the Person of William Norton, a minor.

JOHN C. GATTI.

Subscribed and sworn to before me, this 17th day of November, A. D., 1904.

JOHN R. HAMPTON,
Notary Public.

[Seal of Notary Public.]

My commission expires Aug. 1, 1907.

Endorsed as follows: No. 350. Filed November 18, 1904, P. C. Little Clerk. Recorded in Min. Book 4, at page 231.

21 EXHIBIT B.

Notice of Appeal.

In the Probate Court of the County of Graham, Territory of Arizona.

Case No. 350.

In the Matter of the Application of JOHN C. GATTI for Letters of Guardianship of WILLIAM NORTON, a Minor.

To Messrs. John R. Hampton & F. B. Laine, Attorneys for Petitioner in the above entitled cause:

GENTLEMEN: You will please take notice, that the New York Foundling Hospital, a corporation, will appeal from the order of the Probate Court of Graham County, Arizona Territory, heretofore entered in the above entitled cause upon the 16th day of November, 1904, denying the prayer of the said The New York Foundling Hospital for the custody of the above named minor child, and ordering that Letters of Guardianship be granted to the above named John C. Gatti, and that the said The New York Foundling Hospital does appeal from all other matters and things in the said order and decree more fully set out.

That said appeal will be prosecuted to the District Court of the Second Judicial District of the Territory of Arizona, in and for Graham County.

Yours very respectfully,

BENNETT & WILLIAMS,

Attorneys for the New York Foundling Hospital.

22 Endorsed as follows: No. 350. Filed December 5, 1904, P. C. Little, Clerk. By Geo. Carltob, Deputy.

(Endorsed:) No. 209. In Supreme Court of Arizona. In Matter of Application of New York Foundling Hospital for Writ of *Habeas Corpus*. Return of Respondent John C. Gatti. Filed Jan. 10, 1905. S. M. Cullom, Clerk.

23 *Amended Petition.*

In the Supreme Court, Territory of Arizona.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus*.

To the Honorable, The Supreme Court of the Territory of Arizona:

Now comes the New York Founding Hospital and makes petition to this Honorable Court, and alleges and avers:

I.

That the petitioner is a corporation organized and existing under the laws of the State of New York.

II.

That under and by virtue of an act of the people of the state of New York represented in senate and assembly, passed May 11, 1872, entitled "An Act to amend the Charter of the Foundling Asylum of the Sisters of Charity in the city of New York," and being known as Chapter 635 of the laws of 1872, of the State of New York, the petitioner was duly authorized and empowered to receive and keep under its care, charge, custody and management children of the age of two years or under, found in the city of New York, abandoned or deserted and left in the crib or other receptacle of petitioner for foundlings, and to keep such children during their infancy, a copy of which said act is hereto annexed and made a part of this petition.

24

III.

That on the 4" day of October, 1901, in pursuance and by virtue of the said act the petitioner in the city of New York found and received and took under its care, charge, custody and management a certain child named William Norton, the said child having been born on the said 4" day of October, 1901, and being found on said day in the said city of New York abandoned and deserted and left in the crib of the petitioner for foundlings.

IV.

That the petitioner from the said 4" day of October, 1901, until the 2d day of October, 1904, kept the said child William Norton under its care, charge, custody and management.

That on or about the 1" day of October, 1904, the petitioner in the exercise of its care, charge, custody and management of the said child William Norton, placed the said child in the home of a certain person in the town of Clifton, County of Graham, Territory of Arizona, to be held and cared for by the said person in said home temporarily, and at all times subject to the supervision of the petitioner and its officers and agents; and that at such time the petitioner had officers and agents of trained experience at the town of Clifton with instructions to supervise the said child and the care and management of it while temporarily in the charge and care of the said person as aforesaid; that at all times the petitioner had the right at will to withdraw the said child from the care and charge of the said person and

25 retain the custody thereof, and to assume the custody thereof, and to continue to keep the said child in pursuance of law under its care, charge, custody and management during the term of its infancy as aforesaid.

V.

Upon information and belief that thereafter, and on or about the 2d day of October, 1904, one John C. Gatti residing at the said town of Clifton, his servants and employes, unlawfully and with force and violence, entered into the house of the said person where at the time of said unlawful entrance the said child William Norton was, having been placed there as aforesaid, and forcibly, unlawfully and

without right took possession of the said William Norton and removed him thence to the custody of the said John C. Gatti. That the said child has ever since said day been in the custody and under the control of the said Gatti, and that the said child is now restrained of its liberty by the said Gatti without the consent or license of the petitioner and against its desire, intention and protest, and in violation of its rights under the laws of the state of New York, of the United States and of this Territory.

Wherefore, the petitioner demands that the writ of this Honorable Court issue, directed to the said John Gatti, commanding him to have the body of the said child William Norton in the court room in the city of Phœnix, County of Maricopa, Territory of Ari-
26 zona, at the opening of the term of this Honorable Court, on the 9″ day of January, 1905, to do and receive what shall then and there be considered concerning the said child William Norton.

T. D. BENNETT,
EUGENE S. IVES,
Attorneys for Petitioner.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Thomas D. Bennett and Eugene S. Ives being duly sworn, depose and say, and each for himself deposes and says: that they are the attorneys for the New York Foundling Hospital, the petitioner in the foregoing petition, and have signed the said petition in behalf of the said New York Foundling Hospital; that they have, and each of them has read the foregoing petition, and that they know the contents thereof, and that the same is true to the knowledge of both of them except as to the matters therein stated to be alleged on information and belief, and as to those matters each of them believes it to be true.

THOS. D. BENNETT.
EUG. S. IVES.

Subscribed and sworn to before me this 12th day of January, 1905.
[SEAL.] ELIAS F. DUNLEVY,
Clerk District Court.

27 CHAP. 635.

An Act to Amend the Charter of the Foundling Asylum of the Sisters of Charity, in the City of New York.

Passed May 11, 1872; three fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Foundling Asylum of the Sisters of Charity of the city of New York, a corporation created, organized and acting under and by virtue of the laws of this State, are hereby authorized and empowered to receive and keep and take under its care, charge, custody and management, the following children or persons:

1. Children of the age of two years or under, found in the city of

New York, abandoned or deserted, as hereinafter mentioned and specified.

2. Children of the like age, whose father or mother is dead and whose surviving parent is for any cause unable to maintain them, and who, by consent in writing of such surviving parent, may be entrusted to such corporation.

3. Children of like age, born out of wedlock, who, by the consent of the mother, may be entrusted to the said corporation; which class shall also include children, whether born in wedlock or not, left in the crib or other receptacle of the said corporation for foundlings.

4. Children of like age, having no parent living, and who,
28 by consent in writing of their guardian, or nearest relative of full age, may be entrusted to said corporation.

5. Children of like age, who may be transferred and entrusted to said corporation by the commissioners of public charities and correction of the city and county of New York.

6. The said corporation may also, with a view to health and nourishment of the child and reformation of the mother, receive temporarily the mother of any such child, born out of wedlock, committed or entrusted as aforesaid, and discharge her; provided always, that such mother shall not be received or detained except on her own request, and by and during her free will and consent.

S. 2. Children entrusted to said corporation by the voluntary act of their parents, guardian or nearest relatives, as hereinbefore provided, shall be deemed to be in the lawful charge and custody of said corporation. Such entrusting shall be made and evidenced by an instrument in wrting in form substantially as follows, viz:

I, A. B. (father, mother, guardian or nearest relatives, as the case may be) of a (Male or female as the case may be named (or not named as the case may be) infant child, aged — born at — hereby surrender and entrust to the foundling asylum of the sisters of charity in the city of New York for the period of — years, the entire management and control of such child, and do hereby assign
29 to and invest said corporation with the same powers and control over said child as those of which I am possessed.

S. 3. Whenever any child, being in the custody of the said corporation, shall, by the commission of any crime or by confirmed evil habits, have become so degraded and debased as, in the opinion of the board of managers, to be an improper subject for the care and management of said corporation, the said corporation shall have the power to deliver such child into the custody of some magistrate or other competent authority of the said city and county of New York, to be disposed of in due course of law. If at any time within three years after any child so found abandoned or deserted as aforesaid shall have been entrusted to the custody of said corporation as above provided, it shall appear to the satisfaction of the board of managers, that such child was for any cause wrongfully or improvidently so entrusted, the said board shall thereupon, on the application of the parents or guardian of said child, discharge the said child and restore it to such parent or guardian. And in case at any time after such abandoned or deserted child shall have been entrusted to said cor-

poration, it shall appear to the board of managers having due regard to the welfare of such child and the purpose of said corporation, expedient or proper to discharge such child, the said board of managers may in their discretion thereupon discharge such child and restore it to its parents, guardian or other protector on such reasonable terms and conditions as the said board may deem right and proper.

S. 4. The said corporation shall have the power, when the children in their care shall respectively attain a proper age, to place them at suitable employments, and cause them to be instructed in suitable branches of knowledge, and, at discretion, to bind out or indenture such child, when of suitable ages, as clerks, apprentices or servants, to some profession, trade or employment, for such time or period as they may deem proper, not exceeding, however, in the case of girls, to the age of eighteen, and in the case of boys, to the age of twenty-one years; provided, however, that in the case of children voluntarily entrusted to said corporation by their parents, guardians or nearest relatives, as hereinbefore provided, the said corporation shall not bind out or indenture any such child for a period beyond the time for which such children have been entrusted to said corporation.

S. 5. No person, to whom any child shall have been bound to service under the provisions of this act, or his executors, administrators or assigns, shall assign or transfer the indenture or contract of service to any other person, nor let or hire out for any period the services of such child, without the consent in writing, of said corporation; and upon granting any such consent, the said corporation may prescribe and impose any terms and conditions they may deem reasonable and proper, and every such assignment, when duly made with consent as aforesaid, shall have the effect to transfer to and vest in the assigned all the rights of the original master; and such assignee shall be subject to all the duties and obligations of such original master.

S. 6. In case of the death of any master to whom any child shall have been bound to service under the provisions of this act, or in case of the death of the assignee of any such master, then such death shall have the effect to cancel and annul indenture or contract of service; and thereupon the said corporation shall resume the charge and management of such child, and have the same power and authority with regard to it as before the indenture or contract of service was made.

S. 7. If any master or assignee shall be guilty of any cruelty or misusage towards any child so bound out to service under the provisions of this act, or shall refuse or neglect to furnish and provide proper food and clothing to such child, or shall commit any other breach or violation of the terms of the indenture or contract of service under which such child is held, such child, or any person in its behalf, may make complaint thereof to the board of managers of the said corporation, or to a justice of the Supreme Court, or some justice of the peace of the county where such child is held to service, or to the mayor recorder, or an alderman, or any other magistrate of any city where such child is so held to service, who shall thereupon Sum-

mon the said master or assignee to appear before them or him, and shall examine into, hear and determine such complaint; and
32 if, upon such hearing, the said complaint shall appear to be well founded, they or he shall, by certificate in writing, discharge such child from the obligation of service, and restore such child to the charge and custody of said corporation, and with the like powers as before the said indenture and contract of service was made and the said master or assignee shall also be liable to the said corporation in a civil action for the breach of the agreement.

Ss. 8. The Board of managers of the said corporation shall be the guardian of every child bound out or held for service under the provisions of this act and shall see that the terms of the contract be faithfully performed by the master or assignee, and that such child is properly treated; and they shall inquire into the treatment of such child and redress any grievance in manner prescribed by law.

Ss. 9. Every master or assignee to whom any child shall be bound or held to service under the provisions of this act, shall, at least once in every six months during such term of service, report in writing to the board of managers of the said corporation the conduct or behavior of such child, and whether such child is still living under the case of the person to whom such child was originally bound, and if not, where and with whom such child is living. And all indentures and contracts of service made under this act shall in terms provide for such report being made.

Ss. 10. All damages that may be recovered and received by said corporation of any master or assignee, for the breach or violation of the indenture or contract of service by which any child
33 shall be bound out under the provisions of this act, after deducting therefrom the necessary expenses of recovering and collecting the same, shall be held by the said corporation in trust for, and paid over to said child; if a female, at the age of eighteen years, and if a male, at the age of twenty-one years; provided, however, that if such child shall die before attaining such age, the said damages shall revert and belong to the said corporation.

S. 11. Whenever any child, properly chargeable upon the fund placed by law at the disposal of the commissioners of emigration, shall agreeably to the provisions of this act, be entrusted to and supported and maintained by the said corporation, the said corporation shall be entitled to receive from the fund the sum of sixty, seventy-five, or one hundred dollars per annum (according to the age of such children respectively), and proportionally for any portion of a year for every such child; provided, however, that in no case shall the sum so to be received, exceed the lowest cost of the support and government of a child of a like age in any of the public institutions at present under the case of the commissioners of public charities and correction of said city and county of New York.

S. 12. In each and every year, after this act shall take effect, the board of supervisors of the city and county of New York shall levy and collect by tax, at the same time and in the same man-
34 ner as the contingent charges and expenses of the city and county are levied and collected, and pay over to the said cor-

poration such a sum per week, for every infant under eighteen months of age, as the commissioners of charities and corrections shall certify to have been expended during the last previous fiscal year in the care and provision for the infants per week each, in the infants' hospital which is under the control of the said commissioners; and for every child over the age of eighteen months, such a sum per year, in monthly payments, as the said commissioners shall certify to have been expended as an average cost for maintenance and hospital care of each child for a full year at the institution known as the nursery for children, on Randall's Island, in the last previous fiscal year, as shown and reported by the said commissioners. And the said commissioners shall so inform and certify upon the request of the managers of said asylum, on or before the fifteenth day of May in each year, and such certification shall be based upon the total expenditures charged and chargeable by the said commissioners against their said infants' hospital and their said nursery (according to the ages of the children continuing in the house), and proportionally for any fraction of a year for each and every child which, agreeable to the provisions of this act shall be entrusted to the care and custody of the said corporation from the city and county of New York, and shall be supported and maintained by them. It is further provided, that whenever a homeless or needy mother has received care
35 and attendance in the lying-in wards of the said corporation which it is hereby authorized to have and maintain, the managers of said asylum shall be entitled to receive and shall receive from the county treasury, as hereinabove provided, the sum of twenty-five dollars, for said care and obstetric attendance, and whenever any mother thus domiciled and attended at the birth of her child, and whenever any other homeless or needy mother with a nursing infant, resides at the asylum by request of its officers, and wet nurse her own infant, the managers of the said institution shall be entitled to receive such sums as are herein designated and provided in the manner hereinafter specified, viz: for the necessary aid in maintenance for such nursing by mothers in said asylum and for the maintenance of such mothers and to aid them to enter upon useful life under such guidance and pecuniary assistance by said managers the sums which the said commissioners of public charities shall certify to be proper, and to be paid as hereinbefore provided in monthly, quarterly or annual payments, as said board of managers may request.

Ss. 13. This act shall take effect immediately.

STATE OF NEW YORK, *Office of the Secretary of State, ss:*

I have compared the preceding with the original law on
36 file in this office, and do hereby certify that the same is a correct transcript therefrom, and the whole of said original law.

Given under my hand and the seal of office of the Secretary of State, at the city of Albany, this 25" day of November, in the year one thousand nine hundred and four.

(Signed) HORACE G. TENNANT,
Secretary of State.

(Endorsed:) No. 209. In the supreme court of the Territory of Arizona. In the matter of the application of the New York Foundling Hospital, a corporation, for a writ or *habeas corpus*. Original amended petition. Filed Jan. 12, 1905. S. M. Cullom, clerk.

37 In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of the NEW YORK FOUNDLING HOSPITAL for a Writ of *Habeas Corpus*.

Now comes the petitioner and demurs and excepts to the separate defense in that portion of the return appearing at pages one and two thereof, on the ground that it appears by said portion of said return that the judgment set forth in paragraph I thereof has been vacated and annulled.

Now comes the petitioner and if said demurrer is not sustained and exception not allowed, moves to strike out all of said portion of said return on the ground that the said judgment pleaded therein has been vacated and annulled and is of no force or effect whatever.

EUGENE S. IVES,
THOMAS D. BENNETT,
Attorneys for Petitioner.

38 In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of the NEW YORK FOUNDLING HOSPITAL for a Writ of *Habeas Corpus*.

Now comes petitioner and demurs and excepts to the defense set forth in the second alleged defense of said return and which appears in paragraphs two and three thereof, on the ground that said portion of said return does not constitute a defense to the petition.

Now comes the petitioner and if said demurrer be overruled and exception disallowed, moves the court to strike out the following portions of said alleged defense appearing in paragraphs II and III thereof to-wit: All of paragraph II thereof and the last five lines of paragraph III thereof appearing on page 3, and beginning with the words "and this defendant further answering," and ending with the words "abandoned the same" on the ground that said five lines constitute a conclusion of law and are immaterial and irrelevant.

Wherefore, petitioner moves for judgment upon the pleadings in accordance with the prayer of petitioner.

EUGENE S. IVES,
THOMAS D. BENNETT,
Attorneys for Petitioner.

39 And the petitioner further answering and traversing the said return of the respondent, alleges and avers:

I.

The petitioner denies that on the 21" day of October, 1904, the said William Norton was an inhabitant or resident of Graham

County, Arizona, or had no guardian legally appointed by will or deed or otherwise; and avers that at all times mentioned in the petition and return the said William Norton was an inhabitant and resident of the city of New York in the state of New York, and that your petitioner was during all such times its legal guardian, appointed in pursuance and by virtue of the laws of the State of New York as in petition alleged.

And the petitioner alleges that it has no information as to whether on the 21" day of October, 1904, or at any other time mentioned in the petition or return, the respondent was a resident of Graham County or a fit or proper person to be the guardian of William Norton or of any minor, and therefore denies the same.

And petitioner alleges upon information and belief that the proceedings referred to in paragraph one of the return in the Probate Court of the County of Graham, were without jurisdiction and void and that no notice was given to petitioner as required by statute; and avers that the order entered in said court purporting to appoint the respondent guardian of the person of said minor and
40 directing that letters of guardianship be issued out of said court to the respondent was void and without jurisdiction.

II.

Petitioner has no knowledge or information sufficient to form a belief as to whether the respondent qualified duly or otherwise as guardian by taking the oath prescribed by law or giving the bond required by said alleged order, and therefore denies the same.

And petitioner denies that the respondent was or is now or was at any time the legally appointed guardian of said minor in this territory.

And petitioner denies that the said minor ever since the said appointment has been or now is in the care, custody or control of the respondent by virtue of any letters of guardianship, but alleges that the said minor has been in the care, custody and control of the respondent by force and violence and without authority of law or of any person legally authorized to place the said child in the custody of the said respondent.

III.

Petitioner denies that the petitioner brought the said child to the Territory of Arizona and abandoned him to the keeping of a Mexican Indian, who was, and is financially unable to properly feed, clothe, shelter and educate said child, or who was by reason of race, mode of living, habits, education, entirely unfit to have
41 the care, control or education of said child, or that petitioner at any time abandoned the said child to the keeping of a Mexican Indian or of any person whatever.

IV.

Upon information and belief petitioner denies that upon proper representation of any facts to the said alleged Mexican Indian or to

anyone who had temporary custody of said child the said child was by such person voluntarily surrendered to any person or persons whatever, or that thereafter or at any time the said child was placed in the care, custody or control of respondent by any person or persons to whom the said child had been voluntarily surrendered; and petitioner alleges upon information and belief that the said representations which induced the surrender of the said child to the persons who unlawfully and without right turned over the child to the custody of the respondent, were of such a character as to make the said person who so turned over the child in fear of personal violence, and that said representations were made with the purpose to coerce the turning over of the said child by such persons; and that said persons, as petitioner is informed and believes who so received the said child from the said alleged Mexican Indian, as petitioner is informed and believes, were an illegally constituted committee appointed by a mob for the purpose of wresting the custody of the said child and of other children from such person or persons who had temporary custody of them, and of detaining them unlawfully and by force and threats.

42 V.

Petitioner further denies that it has not at all times had the right to the care, custody and control of the said child in this territory and elsewhere, and denies that it has ever waived forfeited or abandoned the same.

THOMAS D. BENNETT,
EUGENE S. IVES.
Attorneys for Petitioner.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Sister Anna Michella being duly sworn, deposes and says: That she is the assistant secretary of the petitioner above named; that she has read the foregoing petition, knows the contents thereof, and that the same is true of her own knowledge except as to the matters therein stated to have been alleged upon information and belief, and as to those matters she believes it to be true.

SISTER ANNA MICHELLA.

Subscribed and sworn to before me this 12th day of January, 1905.
[SEAL.] ELIAS F. DUNLEVY,
Clerk District Court.

My commission expires

(Endorsed:) No. 209. In the Matter of the Application of the New York Foundling Hospital for Writ of *Habeas Corpus*. Original demurrer & motion and traverse to return. Filed Jan. 12, 1905. S. M. Cullom, Clerk.

43 III.

Petitioner admits that the minor, William Norton, is a white Caucasian child of the Anglo Saxon race. That on or about October,

1904, the petitioner brought the child to the Territory of Arizona and placed him temporarily in the keeping of a Mexican Indian whose name is unknown to the respondent, and who was unable properly to feed, clothe, shelter, maintain and educate said child, and who was otherwise by reason of his race, mode of living, habits and education entirely unfit to have the care, control, custody and education of said minor. But petitioner denies that petitioner ever abandoned the said child to the keeping of the said Mexican Indian; and alleges that when petitioner left the said child in the keeping of the said Mexican Indian temporarily as aforesaid, the petitioner was informed and believed that the said person was a Spaniard, financially able to properly feed, clothe, shelter, maintain and educate said child and was in all respects entirely fit to have the care, control and education of said minor.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. Petitioner's Amendment to Traverse to Return. Filed Jan. 16, 1905. S. M. Cullom, Clerk.

44 175 East 68th Street, New York, N. Y.

Dear Friend: Within a week after the reception of the little one, will you please fill out the enclosed slip and forward it to us.

Please also to write us yearly about May 1st, how the little child is progressing, with any items of interest.

Wishing you many blessings for your kindness to the orphan, I am, in our dear Lord,

Yours respectfully, SR. TERESA VINCENT.

(Endorsed:) No. 209. Respondent's Exhibit 2. Filed Jan. 14, 1905. S. M. Cullom, Clerk.

45 Name of Child received ——.
Name of Foster-parents (in full) ——.
Business or Occupation ——.
Post Office Address (in full) ——.

(Endorsed:) No. 209. Respondent's Exhibit 2. Filed Jan. 14, 1905. S. M. Cullom, Clerk.

29
Padua Nunez,
Clifton, Arizona.
Edward Gibson,
Born Aug. 7—1900.

(Endorsed:) No. 209. Exhibit 3, Respondents. Filed Jan. 17, 1905. S. M. Cullom, Clerk.

46 In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

The petition of John C. Gatti respectfully shows:

That your petitioner has now in his custody, and under his control William Norton the minor child of persons unknown to your petitioner.

That said minor child is of the age of about two years and six months or thereabouts.

That said minor is at present under the care and control of your petitioner.

That said minor has no guardian legally appointed by will or otherwise.

That said minor is a resident of Clifton, Graham County, Territory of Arizona.

That the said minor is an abandoned child, and is in need of care, nurture and education.

That said minor child is in need of the appointment of a guardian of its person.

That so far as is known to your petitioner said minor has no relatives residing within this Territory.

Wherefore your petitioner prays, that your petitioner John C. Gatti who is a fit and proper person, or such other fit and
47 proper person be appointed guardian of the said minor, as may be deemed fit and proper, in the manner required by law.

Dated October 21, 1904.

JOHN C. GATTI, *Petitioner.*

TERRITORY OF ARIZONA, *County of Graham, ss:*

John C. Gatti being first duly sworn upon his oath says: that he has read the foregoing his petition and knows the contents thereof: that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

JOHN C. GATTI.

Subscribed and sworn to before me this the 21st day of October, A. D., 1904.

[Seal of Notary Public] JOHN R. HAMPTON,
Notary Public.

My Commission Expires August 1, 1907.

Endorsed: No. 350. Filed October 25, 1904. P. C. Little, Clerk.

48 *Order Appointing Day for Hearing Petition for Guardianship, and Directing Notice to be Given.*

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

John C. Gatti having this day petitioned the court for the appointment of a guardian of the person of said minor:

It is ordered that Wednesday, the 2nd. day of November, A. D. 1904, at Nine o'clock A. M., be and the same is hereby fixed as the time for the hearing of said petition;

And it appearing to the satisfaction of the court that said minor has no relatives residing within this county or Territory that the relatives of said minor are unknown, and that personal service of notice of the hearing of said petition can not be had upon the relatives of said minor;

It is hereby further ordered that notice of the hearing of said petition be given by the Clerk of this Court to the person having the care of said minor and to the relatives of said minor, and that said notice be served on said parties by the posting of notices of said hearing in at least three public places in said County of Graham, Territory of Arizona, for at least six days before the hearing of said petition.

Dated October 25, A. D., 1904.

P. C. LITTLE,
Judge of the Probate Court.

Endorsed as follows: No. 350. Filed October 25, 1904, P. C. Little, Clerk. Recorded in Min. Book 4, at page- 206 & 207.

49 *Proof of Posting Notice of Application for Letters of Guardianship.*

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

TERRITORY OF ARIZONA, *County of Graham, ss:*

P. C. Little, Clerk of the Probate Court in and for the County of Graham, Territory of Arizona, being duly sworn, on oath deposes and says: That on the 26th day of October A. D., 1904, he posted exact and true copies of the annexed notice of application for letters of guardianship mentioned in said notice in three of the most public places of the County of Graham, Territory of Arizona, to-wit: One copy of said notice at the door of the Court House of said Graham County, one at the Post Office in Solomonville in said County of

Graham and one at the Public Well in Solomonville in said County of Graham. That the annexed is a copy of said notice.

P. C. LITTLE,
Clerk of the Probate Court.

Subscribed and sworn to before me this 26th day of October, A. D., 1904.

(Seal of the Board of Supervisors of Graham County, Territory of Arizona.)

BEN R. CLARK,
Clerk of the Board of Supervisors,
By GEO. CARLTON, *Deputy Clerk.*

Endorsed as follows: No. 350. Filed October 26, 1904, P. C. Little, Clerk.

50 *Notice of Application for Letters of Guardianship.*

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

The Petition of John C. Gatti praying for the issuance of letters of Guardianship to himself on the person of William Norton, a minor, has been set for hearing on Wednesday, the 2nd day of November A. D. 1904, at 9 o'clock A. M., at the County Court House, in the Court room of said Court, in Solomonville, County of Graham, Territory of Arizona.

Dated October 26, 1904.

P. C. LITTLE.
Clerk of the Probate Court.

51 In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Application of John C. Gatti for letters of guardianship of William Norton, a minor, Case No. 350; and Application of John C. Tyler for Letters of Guardianship of Marie Mack, a minor, Case No. 364; and Application of C. C. Reed for Letters of Guardianship of Joseph Ryan, a minor, Case No. 363; and Application of Mrs. Rose Hill for Letters of Guardianship of Raymond Spencer, a minor, Case No. 362; and Application of George W. High for Letters of Guardianship of George Weber, a minor, Case No. 361; and Application of Harry Wright for Letters of Guardianship of Catherine Fitzpatrick, a minor, Case No. 360; and Application of Mrs. Olive Freeman for Letters of Guardianship of Sadie Green, a minor, Case 359; and Application of Hugh Quinn for Letters of Guardianship of Gabriella Welsh, a minor, Case No. 358; and

Application of W. H. Cooper for Letters of Guardianship of Pearl Kendricks, a minor, Case No. 357; and Application of Rebecca H. Tong for Letters of Guardianship of Helen Tong, a minor, Case No. 356; and Application of George Fraser for Letters of Guardianship of Hannah Kane, a minor, Case No. 355; and Application of Jacob Abraham for Letters of Guardianship of Josephine Corcoran, a minor, Case No. 354; and Application of C. F. Pascoe for Letters of Guardianship of Jerome Shanley, a minor, Case No. 353; and Application of Sam Abraham for Letters of Guardianship of Elizabeth Kane, a minor, Case No. 352; and Application of
52 Thomas Simpson for Letters of Guardianship of Anna Louise Dorherty, a minor, Case No. 351, and Application of James Hargis for Letters of Guardianship of Edward Gibson, a minor, Case No. 365.

Comes now the New York Foundling Hospital, a corporation organized and existing under and by virtue of the laws of the State of New York, and respectfully shows to the Court, that in all the above entitled cases the minors over whom letters of guardianship are sought to be taken out and granted by this Court, are each and all of them foundling children from the city of New York and were formerly wards of this corporation;

That on or about the first day of October, 1904, the said children were by the sisters of the said the New York Foundling Hospital brought from New York to Clifton, Arizona, for the purpose of establishing said children in suitable homes; and said children were on or about the first and second days of October, 1904, duly established in respectable homes, the said homes to be supervised and fully considered before said children were to be allowed to stay therein permanently.

That all the above-named applicants and others, to your objector unknown, forcibly took and removed from said sisters of said the New York Foundling Hospital the said above-named minor children and they were by the above-named applicants surreptitiously taken and kidnapped without any authority on the part of said sisters or the agents or employes of the said The New York Foundling Hospital, and contrary to the wishes and will of the duly
53 authorized agents and the sisters of said Hospital.

Your objector expressly denies that said children, or either of them, were ever abandoned or that they were without proper custody or were neglected, but on the contrary, your objector alleges that the custody, care, and control of the said children, and each of them, was shown by the proper authorities, agents, and officers as well as the sisters of the said The New York Foundling Hospital; and that the detention of the said children from the officers and agents of the aforesaid Hospital is without authority of law, and the inception of said detention was brought about through menace, fraud, and duress.

That said officers and agents of this objector were obliged to release the custody of said minor children against their will and consent and by means of threats and violence.

Wherefore this objector respectfully prays that the application above set out and in each of said cases, be denied; and that the care, custody, and control of the above-named minor children be restored to this objector.

Respectfully submitted.

BENNETT & WILLIAMS,
Attorneys for Objector.

TERRITORY OF ARIZONA, *County of Graham, ss:*

Thomas D. Bennett, being first duly sworn, deposes and says: That he is one of the attorneys for the above-named The New York Foundling Hospital and makes this affidavit in behalf of said objector; that he has read the foregoing complaint and to the best of his information and belief, the facts therein stated are true.

THOS. D. BENNETT.

Subscribed and sworn to before me this 2nd day of November, 1904.

P. C. LITTLE,
Clerk of the Probate Court.

Endorsed as follows: No. 350 to 365. Filed November 2, 1904. P. C. Little, clerk.

54 In the Probate Court of Graham County, Arizona Territory.

In re Application of JOHN GATTI for Letters of Guardianship of WILLIAM NORTON, and in Cases Nos. 350 to 365, Inclusive.

In the above entitled cases J. R. Hampton, counsel for the several applicants, and Messrs. Bennett and Williams of counsel for the Objector, The New York Foundling Hospital, have stipulated in behalf of the respective parties that the hearing of the said cases and applications be continued for a period of two weeks from this date. That at said time the Objector may introduce testimony in support of said objections, if so desired, and that the several applicants may introduce further testimony in rebuttal if they so desire.

Dated at Solomonville, Arizona, this 2nd day of Nov. 1904.

JOHN R. HAMPTON,
Counsel for Petitioners in the Causes Numbered as Above.
BENNETT & WILLIAMS,
Counsel for the Above-named Objector.

Endorsed as follows: Nos. 350 to 365 inclusive. Filed November 2, 1904. P. C. Little, clerk. Recorded in Min. Book 4, at page 223.

55 *Order of Continuance.*

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON ET AL., Minors.

The petitions of John C. Gatti, *et al.*, asking for Letters of Guardianship of the Persons of William Norton, *et al.*, minors, being cases numbered from No. 350 to No. 365 inclusive, coming on regularly to be heard this day, and it appearing to this Court that John R. Hampton, attorney for petitioners, and Bennett & Williams, attorneys for The New York Foundling Hospital, appearing herein, have filed a stipulation in this court for a continuance for two weeks,—

It is therefore ordered that the hearing of said petitions be and the same is hereby continued until Wednesday, the 16th day of November, A. D. 1904, at the hour of ten o'clock A. M. of said day.

Dated November 2, 1904.

P. C. LITTLE,
Judge of the Probate Court.

Endorsed as follows: No. 350 to No. 365, inclusive. Filed November 2, 1904. P. C. Little, clerk. Recorded in Min. Book at pages 222 & 223.

56 *Order Appointing Guardian.*

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

The petition of John C. Gatti for the appointment of himself as the guardian of the person of said minor, coming on regularly this day to be heard, and upon due proof to the satisfaction of said Court: That due and legal notice has been given of the hearing of said petition; that said minor is a resident of Clifton, County of Graham, and has no legally appointed guardian of its person; that said minor is an abandoned child, and is in need of nurture, care and education; that said minor is in need of the appointment of a guardian of its person; and that John C. Gatti is a fit and proper person to be appointed guardian of the person of said minor; and the person now having the care of said minor having duly appeared in this proceedings; and the New York Foundling Hospital, a corporation organized and existing under the laws of the State of New York, having also appeared herein by its attorneys, Bennett & Williams, and having filed herein its objection to the appointment of said petitioner as guardian of the person of said minor, and praying, in said objection, for the care, custody and control of said minor:

57 And the matter having been submitted for decision, and it appearing to the Court from all the evidence produced that

it is to the best interest of said minor in respect to its temporal and its mental and moral welfare that the prayer of said The New York Foundling Hospital should be denied, and that the prayer of said petitioner should be granted;

It is, therefore, hereby ordered and adjudged that the prayer of the New York Foundling Hospital for the care, custody and control of said minor be and the same is hereby denied;

And it is hereby further ordered and adjudged that said John C. Gatti be and he is hereby appointed guardian of the person of said minor, and that Letters of Guardianship of the person of said minor be issued to him upon his giving bond to William Norton said minor, in the penal sum of Three Hundred Dollars, and upon his taking and subscribing an oath according to law;

And it is further ordered and adjudged (the said John C. Gatti having consented thereto in open court) that it shall be obligatory upon said guardian, John C. Gatti, to provide, at his own expense, proper food, clothing, shelter, care and medical attention for said minor at all times during said guardianship, and shall educate and care for said minor in a proper manner; and that the performance of the foregoing obligations and conditions is hereby made a part of the duties of said guardian, for the faithful performance of which he and the sureties on his bond are responsible.

Dated November 16, A. D., 1904.

58 P. C. LITTLE,
Judge of the Probate Court.

Endorsed as follows: No. 350. Filed November 16, 1904, P. C. Little, Clerk. Recorded in Min. Book 4, at page 240.

59 *Bond.*

Know all men by these presents, That we, John C. Gatti, as principal, and Sam Abraham and Lamar Cobb, Jr. as sureties, are held and firmly bound unto William Norton, a minor, in the sum of Three Hundred Dollars, lawful money of the United States of America, to be paid to the said William Norton for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 17th day of November A. D. 1904.

The Condition of the above obligation is such that whereas, by an Order of the Probate Court of the County of Graham, Territory of Arizona, duly given, made and entered on the 16th day of November, A. D. 1904, the above bounden John C. Gatti was appointed guardian of the person of William Norton and letters of Guardianship were directed to be issued to him upon his executing a bond according to law, in said sum of Three Hundred Dollars.

Now Therefore, if the said John C. Gatti, as such guardian shall faithfully execute the duties of the trust according to law, then this obligation shall be void, otherwise to remain in full force and effect.

JOHN C. GATTI. [SEAL.]
LAMAR COBB, JR. [SEAL.]
SAM ABRAHAM. [SEAL.]

60 TERRITORY OF ARIZONA, *County of Graham, ss:*

Sam Abraham and Lamar Cobb Jr. the sureties named in the above bond, being duly sworn, each for himself, says: That he is a free holder and resident within said Territory, and is worth the said sum of Three Hundred Dollars, over and above all his debts and liabilities, exclusive of property exempt from execution.

LAMAR COBB, JR.
SAM ABRAHAM.

Subscribed and sworn to before me this 17th day of November, 1904.

[Seal of Notary Public.]

JOHN R. HAMPTON,
Notary Public.

My Commission Expires August 1, 1907.

Endorsed as follows: No. 350. Approved this 18th day of November 1904. P. C. Little, Judge of the Probate Court. Filed November 18, 1904, P. C. Little, Clerk. Recorded Book 1 pages 330-31-32.

61 *Letters of Guardianship.*

In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

TERRITORY OF ARIZONA, *County of Graham, ss:*

John C. Gatti is hereby appointed Guardian of the Person of William Norton, a minor.

Witness, P. C. Little, Clerk of the Probate Court of the [SEAL.] County of Graham, Territory of Arizona, with the Seal of said Court affixed, this 18th day of November, A. D., 1904.

By order of the court.

P. C. LITTLE, *Clerk.*

TERRITORY OF ARIZONA, *County of Graham, ss:*

I do solemnly swear that I will support the Constitution of the United States, and the Laws of the Territory of Arizona, and that I will faithfully perform, according to law, the duties of Guardian of the Person of William Norton, a minor.

JOHN C. GATTI.

Subscribed and sworn to before me, this 17th day of November, A. D., 1904.

[Seal of Notary Public.] JOHN R. HAMPTON,
Notary Public.

(My commission expires Aug. 1, 1907.)

Endorsed as follows: No. 350. Filed November 18, 1904, P. C. Little, Clerk. Recorded in Min. Book 4, at page 231.

62 *Notice of Appeal.*

In the Probate Court of the County of Graham, Territory of Arizona.
Case No. 350.

In the Matter of the Application of JOHN C. GATTI for Letters of Guardianship of WILLIAM NORTON, a Minor.

To Messrs. John R. Hampton & F. B. Laine, Attorneys for Petitioner in the above entitled cause.

GENTLEMEN: You will please take notice, that the New-York Foundling Hospital, a corporation, will appeal from the order of the Probate Court of Graham County, Arizona Territory, heretofore entered in the above entitled cause upon the 16th day of November, 1904, denying the prayer of the said The New-York Foundling Hospital for the custody of the above named minor child, and ordering that Letters of Guardianship be granted to the above named John C. Gatti, and that said The New-York Foundling Hospital, does appeal from all other matters and things in the said order and decree more fully set out.

That said appeal will be prosecuted to the District Court of the Second Judicial District of the Territory of Arizona, in and for Graham County.

Yours very respectfully,

BENNETT & WILLIAMS,
Attorneys for The New York Foundling Hospital.

Endorsed as follows: No. 350. Filed December 5, 1904, P. C. Little, Clerk. By Geo. Carlton, Deputy.

63 In the Probate Court of the County of Graham, Territory of Arizona.

Case No. 350.

In the Matter of the Application of JOHN C. GATTI for Letters of Guardianship of WILLIAM NORTON, a Minor.

Know all men by these presents, That we, the undersigned, The New York Foundling Hospital, a corporation duly organized and ex-

isting under and by virtue of the laws of the State of New York as principal, and W. H. Brophy and M. J. Brophy and A. T. Sowle and C. C. H. Holz as sureties, are held and firmly bound unto the Territory of Arizona in the penal sum of Two Hundred Dollars, for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors and assigns, jointly and severally, firmly, by these presents.

The conditions of the above obligation is such, that whereas, on the sixteenth day of November, 1904, at the City of Solomonville, Graham County, Arizona Territory, an order was duly made and entered in the above entitled cause by the Hon. P. C. Little, Judge of the Probate Court of Graham County, Arizona Territory, granting letters wherein it was "ordered and adjudged that the prayer of the New York Foundling Hospital for the care, custody and control of the said minor, be and the same is hereby denied;" and it was
64 further ordered that John C. Gatti be appointed guardian of the person of said minor, and the other matters and things in said order as therein set out concerning said guardianship and the bond to be given on the granting of said letters of guardianship to the said John C. Gatti; and,

Whereas, the said The New York Foundling Hospital, the above named principal, and its authorized agents and attorneys, consider the said corporation, principal, and themselves, ag-rieved by the said decision, order, decree and judgment of the said Probate Court and of the Judge of said Court, and pursuant thereto intend to appeal from the said order to the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Graham, and pursuant thereunto have filed their certain notice of appeal in writing in said above entitled cause with the Clerk of the Probate Court above mentioned.

Therefore, the condition of this obligation is such, that if the above named principal, The New-York Foundling Hospital, shall prosecute its said appeal to effect and perform the condition order, decree or judgment which the District Court shall make thereon in case the cause shall be decided against said The New York Foundling Hospital, then this obligation shall be void and of no effect; otherwise in full force and virtue.

THE NEW-YORK FOUNDLING HOSPITAL,
By BENNETT & WILLIAMS, *its Attorneys.*
W. H. BROPHY, *Surety.*
M. J. BROPHY, *Surety.*
A. T. SOWLE, *Surety.*
C. C. H. HOLZ, *Surety.*

65 TERRITORY OF ARIZONA, *County of Cochise, ss:*

W. H. Brophy and A. T. Sowle and C. H. Holz and M. J. Brophy being duly sworn, each for himself and not one for the other, deposes and says, that he is one of the sureties mentioned in the foregoing bond. That he is a resident free-holder of the Territory of Arizona and is worth the sum of Two Hundred Dollars over and above all

just debts and liabilities exclusive of property exempt from execution.

W. H. BROPHY.
A. T. SOWLE.
C. H. HOLZ.
M. J. BROPHY.

Subscribed and sworn to before me, this 28 day of November, 1904.

My Commission expires November 6, 1907.

[Seal of Notary Public.] FRANK E. COLES,
Notary Public in and for Cochise County,
Territory of Arizona.

Endorsed as follows: Approved this 5th day of December 1904, P. C. Little, Clerk. By Geo. Carlton, Deputy. Filed December 5, 1904. P. C. Little, Clerk. By Geo. Carlton, Deputy.

66 In the Probate Court of the County of Graham, Territory of Arizona.

In the Matter of the Guardianship of the Person of WILLIAM NORTON, a Minor.

I, P. C. Little, Clerk of the Probate Court of the County — Graham, Territory of Arizona, hereby certify that the foregoing Transcript is a full, true and correct copy of all the original papers in the above entitled matter, now on file in my office, and of all orders therein made and entered on the minutes of said Court.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Probate Court, this 5th day of January, A. D. 1905.

[SEAL.] P. C. LITTLE,
Clerk of the Probate Court of the County of Graham,
Territory of Arizona.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. Respondent's Exhibit 4. Filed Jan. 17, 1905. S. M. Cullom, Clerk.

67 UNITED STATES OF AMERICA, *State of New York.*

By John F. O'Brien, Secretary of State and Custodian of the Great Seal Thereof.

It is hereby certified, that Horace G. Tenant, was, on the day of the date of the annexed Certificate and Attestation, Second Deputy Secretary of State of the State of New York, and duly authorized by the laws of said State to make such Attestation and Certificate and to perform the duties belonging to the Secretary of State in making such Attestation and Certificate, in like manner as said Secretary

of State; that the said Certificate and Attestation are in due form and executed by the proper officer; that the seal affixed to said Certificate and Attestation is the Seal of Office of the Secretary of State of the State of New York; that the Signature thereto of the said Second Deputy Secretary of State is in his own proper handwriting, and is genuine; and that full faith and credit may and ought to be given to his official acts; and, further, that the Secretary of State is the Custodian of the Original Law so certified and attested and Custodian of the Great Seal of said State hereto affixed.

In testimony whereof, The Great Seal of the State is hereunto affixed.

Witness my hand at the city of Albany the 25th day of November in the year of our Lord one thousand nine hundred and four.

[SEAL] JOHN F. O'BRIEN,
Secretary of State.

68 CHAP. 635.

An Act to Amend the Charter of the Foundling Asylum of the Sisters of Charity, in the City of New York.

Passed May 11, 1872; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Foundling Asylum of the Sisters of Charity of the city of New York, a corporation created, organized and acting under and by virtue of the laws of this State, are hereby authorized and empowered to receive and keep and take under its care, charge, custody and management, the following children or persons:

1. Children of the age of two years or under, found in the city of New York, abandoned or deserted, as hereinafter mentioned and specified.

2. Children of the like age, whose father or mother is dead, and whose surviving parent is for any cause unable to maintain them, and who, by consent in writing of such surviving parent, may be entrusted to such corporation.

3. Children of like age, born out of wedlock, who, by the consent of the mother, may be entrusted to the said corporation; which class shall also include children, whether born in wedlock or not, left in the crib or other receptacle of the said corporation for foundlings.

4. Children of like age, having no parent living, and who,
69 by consent in writing of their guardian, or nearest relative of full age, may be entrusted to said corporation.

5. Children of like age, who may be transferred and entrusted to said corporation by the commissioners of public charities and correction of the city and county of New York.

6. The said corporation may also, with a view to health and nourishment of the child and reformation of the mother, receive temporarily the mother of any such child, born out of wedlock, committed or entrusted as aforesaid, and discharge her; provided

always, that such mother shall not be received or detained except on her own request, and by and during her free will and consent.

§ 2. Children entrusted to said corporation by the voluntary act of their parents, guardian or nearest relatives, as hereinbefore provided, shall be deemed to be in the lawful charge and custody of said corporation. Such entrusting shall be made and evidenced by an instrument in writing in form substantially as follows, viz: I, A. B. (father, mother, guardian or nearest relatives, as the case may be) of a (male or female as the case may be) infant child, aged..... named.....(or not named as the case may be), born at.....do hereby surrender and entrust to the foundling asylum of the sisters of charity in the city of New York for the period of.....years, the entire management and control of such child, and do hereby assign to and invest said corporation with the same powers and
70 control over said child as those of which I am possessed.

§ 3. Whenever any child, being in the custody of the said corporation, shall, by the commission of any crime or by confirmed evil habits, have become so degraded and debased as, in the opinion of the board of managers, to be an improper subject for the care and management of said corporation, the said corporation shall have the power to deliver such child into the custody of some magistrate or other competent authority of the said city and county of New York, to be disposed of in due course of law. If at any time within three years after any child so found abandoned or deserted as aforesaid, shall have been entrusted to the custody of said corporation as above provided, it shall appear to the satisfaction of the board of managers, that such child was for any cause wrongfully or improvidently so entrusted, the said board shall thereupon, on the application of the parents or guardian of said child, discharge the said child and restore it to such parent or guardian. And in case at any time after such abandoned or deserted child shall have been entrusted to said corporation, it shall appear to the board of managers having due regard to the welfare of such child and the purpose of said corporation, expedient or proper to discharge such child, the said board of managers may in their discretion thereupon discharge such child and restore it to its parents, guardian or other protector on such reasonable terms and conditions as the said board may deem right and proper.

71 § 4. The said corporation shall have the power, when the children in their care shall respectively attain a proper age, to place them at suitable employments, and cause them to be instructed in suitable branches of knowledge, and, at discretion, to bind out or indenture such child, when of suitable ages, as clerks, apprentices or servants, to some profession, trade or employment, for such time or period as they may deem proper, not exceeding, however, in the case of girls, to the age of eighteen, and in the case of boys, to the age of twenty-one years; provided, however, that in the case of children voluntarily entrusted to said corporation by their parents, guardians or nearest relatives, as hereinbefore provided, the said corporation shall not bind out or indenture any such child for a period beyond the time for which such children have been entrusted to said corporation.

§ 5. No person, to whom any child shall have been bound to service under the provisions of this act, or his executors, administrators or assigns, shall assign or transfer the indenture or contract of service to any other person, nor let or hire out for any period the services of such child, without the consent in writing, of said corporation; and upon granting any such consent, the said corporation may prescribe and impose any terms and conditions they may deem reasonable and proper, and every such assignment, when duly made with consent as aforesaid, shall have the effect to transfer to and vest in the assignee all the rights of the original master; and such assignee shall
72 be subject to all the duties and obligations of such original master.

§ 6. In case of the death of any master to whom any child shall have been bound to service under the provisions of this act, or in case of the death of the assignee of any such master, then such death shall have the effect to cancel and annul indenture or contract of service; and thereupon the said corporation shall resume the charge and management of such child, and have the same power and authority with regard to it as before the indenture or contract of service was made.

§ 7. If any master or assignee shall be guilty of any cruelty or misusage towards any child so bound out to service under the provisions of this act, or shall refuse or neglect to furnish and provide proper food and clothing to such child, or shall commit any other breach or violation of the terms of the indenture or contract of service under which such child is held, such child or any person in its behalf, may make complaint thereof to the board of managers of the said corporation, or to a justice of the Supreme Court, or some justice of the peace of the county where such child is held to service, or to the mayor, recorder, or an alderman, or any other magistrate of any city where such child is so held to service, who shall thereupon summon the said master or assignee to appear before them or him, and shall examine into, hear and determine such complaint; and if, upon such hearing, the said complaint shall appear to be well founded, they or he shall, by certificate in writing, discharge
73 such child from the obligation of service, and restore such child to the charge and custody of said corporation, and with the like powers as before the said indenture and contract of service was made, and the said master or assignee shall also be liable to the said corporation in a civil action for the breach of the agreement.

§ 8. The board of managers of the said corporation shall be the guardian of every child bound out or held for service under the provisions of this act and shall see that the terms of the contract be faithfully performed by the master or assignee, and that such child is properly treated; and they shall inquire into the treatment of such child and redress any grievance in manner prescribed by law.

§ 9. Every master or assignee to whom any child shall be bound or held to service under the provisions of this act, shall, at least once in every six months during such term of service, report in writing to the board of managers of the said corporation the conduct or behavior of such child, and whether such child is still living under the care of the person to whom such child was originally bound, and if not,

where and with whom such child is living. And all indentures and contracts of service made under this act shall in terms provide for such report being made.

§ 10. All damages that may be recovered and received by said corporation of any master or assignee, for the breach or violation of the indenture or contract of service by which any child shall be bound out under the provisions of this act, after deducting therefrom
74 the necessary expenses of recovering and collecting the same, shall be held by the said corporation in trust for, and paid over to said child; if a female, at the age of eighteen years, and if a male, at the age of twenty-one years; provided, however, that if such child shall die before attaining such age, the said damages shall revert and belong to the said corporation.

§ 11. Whenever any child, properly chargeable upon the fund placed by law at the disposal of the commissioners of emigration, shall, agreeably to the provisions of this act, be entrusted to and supported and maintained by the said corporation, the said corporation shall be entitled to receive from the fund the sum of sixty, seventy-five, or one hundred dollars per annum (according to the ages of such children respectively), and proportionally for any portion of a year for every such child; provided, however, that in no case shall the sum so to be received, exceed the lowest cost of the support and government of a child of a like age in any of the public institutions at present under the care of the commissioners of public charities and correction of said city and county of New York.

§ 12. In each and every year, after this act shall take effect, the board of supervisors of the city and county of New York shall levy and collect by tax, at the same time and in the same manner as the contingent charges and expenses of the city and county are levied and collected, and pay over to the said corporation such a sum
75 per week, for every infant under eighteen months of age, as the commissioners of charities and corrections shall certify to have been expended during the last previous fiscal year in the care and provision for the infants per week each, in the infants' hospital, which is under the control of the said commissioners; and for every child over the age of eighteen months, such a sum per year, in monthly payments, as the said commissioners shall certify to have been expended as an average cost for maintenance and hospital care of each child for a full year at the institution known as the nursery for children, on Randall's Island, in the last previous fiscal year, as shown and reported by the said commissioners. And the said commissioners shall so inform and certify upon the request of the managers of said asylum, on or before the fifteenth day of May in each year, and such certification shall be based upon the total expenditures charged and chargeable by the said commissioners against their said infants' hospital and their said nursery (according to the ages of the children continuing in the house), and proportionally for any fraction of a year for each and every child which, agreeable to the provisions of this act shall be entrusted to the care and custody of the said corporation from the city and county of New York, and shall be supported and maintained by them. It is further provided, that

whenever a homeless or needy mother has received care and attendance in the lying-in wards of the said corporation which it is hereby authorized to have and maintain, the managers of said asylum
76 shall be entitled to receive and shall receive from the county treasury, as herein above provided, the sum of twenty-five dollars, for said care and obstetric attendance, and whenever any mother thus domiciled and attended at the birth of her child, and whenever any other homeless or needy mother with a nursing infant, resides at the asylum by request of its officers, and wet nurses her own infant, the managers of the said institution shall be entitled to receive such sums as are herein designated and provided in the manner hereinafter specified, viz: for the necessary aid in maintenance of such nursing by mothers in said asylum and for the maintenance of such mothers, and to aid them to enter upon useful life under such guidance and pecuniary assistance by said managers, the sums which the said commissioners of public charities shall certify to be proper, and to be paid as hereinbefore provided, in monthly, quarterly or annual payments, as said board of managers may request.

§ 13. This act shall take effect immediately.

STATE OF NEW YORK, *Office of the Secretary of State, ss:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom, and the whole of said original law.

Given under my hand and the seal of office of the Secretary
77 of State, at the City of Albany, this 25th day of November in the year one thousand nine hundred and four.

[SEAL.] HORACE G. TENNANT,
Secretary of State.

(Endorsed:) No. 209. Exhibit "A." Filed Jan. 14, 1905, S. M. Cullom, Clerk.

78 No. 421.

The People of the State of New York, by the Grace of God Free and Independent, To all to whom these presents shall come or may concern, Greeting:

Know Ye, That we, having examined the records and files in the office of the Clerk of the County of New York, and Clerk of the Supreme Court of said State for said County, do find a certain Order Indorsed Filed July 2, 1891, there remaining, in the words and figures following, to-wit:

[SEAL.]

At a Special Term of the Supreme Court of the State of New York, held in and for the City and County of New York, at the County Court House in said city, on the 30th day of June, 1891,

Present: Hon. Miles Beach, Justice.

In the Matter of THE FOUNDLING ASYLUM OF THE SISTERS OF CHARITY IN THE CITY OF NEW YORK, a Charitable Corporation, for an Order to Authorize it to Assume Another Corporate Name.

It appearing to the satisfaction of the Court from the annexed petition of the Foundling Asylum of the Sisters of Charity in the City of New York, verified by the chief officer of said cor-
79 poration, that said petitioner is a charitable corporation, duly incorporated under the laws of the State of New York; that the chief and only business office of said petitioner is situated in the City of New York; that this application is made in pursuance of a resolution of the Board of Managers of the said corporation, and it also appearing to the satisfaction of the Court from the annexed proofs of publication that notice of application for this order has been published for six weeks in two daily newspapers published in the City and County of New York; and it further appearing to the satisfaction of the Court from the aforesaid petition that there is no reasonable objection to said corporation changing its name as prayed for in said petition,—Now, on reading and filing said petition and proofs of publication of notice of application for this order, and on motion of Miller & Wells, attorneys for said petitioner, no one appearing in opposition,

It is Ordered that the said corporation The Foundling Asylum of the Sisters of Charity in the City of New York be and it hereby is authorized to assume the proposed new name, to-wit: The New York Foundling Hospital; and

It is Further Ordered that a copy of this order be published once in each week for four weeks in the Law Journal, a newspaper published in the City and County of New York, which newspaper is hereby designated for that purpose.

MILES BEACH.
J. S. C.
A. L. M.

80 (Endorsed:) N. Y. Supreme Court. *In re* Application Foundling Asylum for leave to change name. Copy Order authorizing change of name.

All which we have caused by these presents to be exemplified, and the Seal of our said Supreme Court to be hereunto affixed.

Witness, Hon. James Fitzgerald, a Justice of the Supreme Court for the County of New York, the Twenty-second day of November in the year of our Lord one thousand nine hundred and four, of our independence the one hundred and twenty-ninth.

[SEAL.] THOS. L. HAMILTON, *Clerk.*

James Fitzgerald, a Presiding Justice at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Thomas L. Hamilton, whose name is subscribed to the preceding exemplification, is the Clerk of the said County of New York, and Clerk of said Supreme Court for said County duly elected and sworn, and that full faith and credit are

due to his official acts. I further certify that the Seal affixed to the exemplification is the Seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated, New York, Nov. 22nd, 1904.

JAMES FITZGERALD,
Justice of the Supreme Court of the State of New York.

81 STATE OF NEW YORK, *City and County of New York, ss:*

I, Thomas L. Hamilton, Clerk of the Supreme Court of said State in and for the County of New York, do hereby certify that Hon. James Fitzgerald whose name is subscribed to the preceding Certificate, is Presiding Justice at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and sworn, and that the signature of said Justice to said Certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, this 22nd day of Nov. 1904.

[SEAL.] THOS. L. HAMILTON, *Clerk.*

(Endorsed:) No. 209. Exhibit "B." Filed Jan. 14, 1905. S. M. Cullom, Clerk.

82 To whom given.	Child.	Date of birth.	Surrendered.	History.
Nazario Mendosa.....	Gabriella Welsh.....	April 5, 1902	May 5, 1902	Born in hospital.
Paula Nuñez.....	Edward Gibson.....	Aug. 7, 1900	Aug. 7, 1900	Born in hospital.
Refugio Legna.....	George Weber.....	Feb. 25, 1900	Mar. 7, 1900	Left by mother Nora, born in Emergency hosp.
Santos Gonzales.....	William Norton.....	Oct. 4, 1901	Oct. 4, 1901	Born in hospital.
Patricio Uretga.....	Raymond Spencer.....	Dec. 23, 1900	Jan. 11, 1901	Left by mother, born in Bellevue hosp.
Marie Espinola.....	Ambrose Lamb.....	Oct. 31, 1900	Dec. 11, 1900	Left by mother born in 1866 Third Ave. gave Lamb.
Marie Espinola.....	Pearl Kendrick.....	July 2, 1901	July 2, 1901	Born in hospital Agnes.
Margarita Espniola.....	Jerome Shanley.....	July 14, 1900	Aug. 21, 1900	Left by nurse from mother's home.
Margarita Espniola.....	Katherine Fitzpatrick..	Sept. 9, 1901	Mar. 25, 1902	Left by mother, born in Sloane hosp.
83 Ramon Bailes.....	Joseph Ryan.....	Sept. 11, 1900	May 6, 1901	Left by mother who gave name.
Angela Flores.....	Josephene Corcoran.....	Mar. 22, 1902	Apr. 5, 1902	Left by mother, born in 17th St. hosp.
Josefa Carrian.....	Violet Lamvick.....	Dec. 10, 1901	Mar. 1, 1902	Left by mother, gave name.
Josefa Villescas.....	Sadie Green.....	Sept. 21, 1901	Oct. 5, 1901	Left by mother, German, gave Sarah.
Refugio Apodaco.....	Elizabeth Kane.....	Oct. 2, 1902	Oct. 2, 1902	Born in hospital, Mary.
Brigrda de Garcia.....	Marie Mack.....	July 27, 1898	Aug. 10, 1898	Left by nurse, from mother's home.
Abegai de Vellescas ...	Anna L. Doherty.....	Oct. 21, 1900	Oct. 21, 1900	Born in hospital.
Concepciou Cegala.....	Hannah Kane.....	Apr. 7, 1901	Apr. 7, 1901	Born in hospital.
Narciencena Cadena....	Edward Cummiskey.....	Apr. 13, 1900	Apr. 27, 1900	Came with mother, Katie.
Josefa de Rueda.....	Agnes Mullen.....	Dec. 12, 1901	Mar. 3, 1902	Left by mother, born in 15th St. hosp.

(Endorsed:) No. 209. Exhibit "C" Filed Jan. 14, 1905. S. M. Cullom, clerk.

84 *Habeas Corpus.*

In the Supreme Court of the Territory of Arizona.

THE NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

It is stipulated by the counsel for the petitioner and the respondent that all pleadings filed and the testimony taken in the above-entitled cause, viz: No-. 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218 shall be taken, applied to, and considered by the court as filed, taken and applied in each of the above cases of the application of the New York Foundling Hospital for writs of *habeas corpus vs.* the following respondents, viz: John C. Gatti, Harry Wright, Harry Laskey, Thomas Simpson, C. C. Reed, J. E. Hargus, Hugh Quinn, J. T. Long, Samuel Abrams, George Frazier, Geo. High, Charles Freeman, Henry Hill, C. F. Pascoe, John Kelley, J. C. Taylor; and that each of said causes shall abide the result of the determination of the case first above-mentioned.

THOS. D. BENNETT,
EG. S. IVES,
Counsel for Petitioner.
W. C. McFARLAND &
BENNETT & BENNETT,
Counsel for Respondents.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. Stipulation. Filed Jan. 17, 1905. S. M. Cullom, clerk.

85 *Final Order.*

In the Supreme Court of the Territory of Arizona.

In the Matter of the Application by THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

Whereas, a Writ of *Habeas Corpus,* directed to John C. Gatti, was on the 2nd day of January, 1905, issued out of this Court upon the application of the above-named petitioner in behalf of William Norton: and

Whereas, on the 10th day of January, 1905, the said John C. Gatti, in obedience to said Writ of *Habeas Corpus,* produced the body of the said William Norton before this Court and made answer and return to said Writ of *Habeas Corpus;* and

Whereas, on the 12th day of January, 1905, the said petitioner made reply to and traversed said answer and return; and

Whereas, upon full consideration of the Writ, the Return, and the Traverse, and of all the evidence introduced on the part of the petitioner, as well as on the part of the respondent, it appears to the Court:

86 That the said William Norton is a minor, of the age of two and a half years; that the best interests of the said Wiliam Norton require that the said John C. Gatti have the care, custody and control of the said William Norton; and that the said John C. Gatti, respondent, has not illegally restrained said William Norton of his liberty.

It is therefore ordered, adjudged and decreed: That the said William Norton be, and he is hereby, remanded to the care, custody and control of the said John C. Gatti, respondent, and that the said John C. Gatti do retain the care, custody and control of the said William Norton.

It is further ordered that the respondent, John C. Gatti, do have and recover of the petitioner, the New York Foundling Hospital, a corporation, his costs and disbursements herein, taxed at $—.

By the Court:

EDWARD KENT,
Chief Justice of the Territory of Arizona.

(Endorsed:) No. 209. In the Supreme Court of Arizona. New York Foundling Hospital, Petitioner, *vs.* John C. Gatti & 16 others, Respondents. Final Order. Filed Jan. 21, 1905. S. M. Cullom, Clerk.

87 *Habeas Corpus. Original.*

In the Supreme Court of the Territory of Arizona.

THE NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

Messrs. Eugene S. Ives, and Bennett & Williams, for Petitioner.

Frederick S. Nave, Esq., U. S. Attorney, by direction of the Attorney-General of the United States, also appeared.

Messrs. W. C. McFarland and Bennett & Bennett for Respondents.

Statement.

The New York Foundling Hospital, a corporation, filed its petition in this Court, praying for a writ of *habeas corpus* to be directed to one John C. Gatti, commanding said Gatti to produce the body of William Norton, an infant, and to make return by what right he holds said infant in his possession and under his custody and control.

In its application for the writ petitioner alleged: That it is a corporation organized and existing under the laws of the State of New

York; that under and by virtue of its charter it is duly authorized and empowered to receive and keep under its care, charge,
88 custody and management, children of the age of two years and under, found in the city of New York, abandoned or deserted and left in the crib or other receptacle of petitioner for foundlings; that by virtue of its charter it found and received, and took under its care, charge, custody and management the child named in the petition; that on or about the first day of October, 1904, in the exercise of its care, charge, custody and management of said child it placed said child in the home of a certain person in the town of Clifton, Graham County, Arizona, to be held and cared for by said person in said home temporarily, and at all times subject to the supervision of the petitioner and its officers and agents; that on or about the second day of October, 1904, the respondent unlawfully and by means of force and violence took possession of said child from the person to whom it was entrusted by the petitioner, and has ever since retained possession of the same, and the said child is now in the custody and under the control of the said respondent without the consent or license of the petitioner, and against its desire, intention and protest.

In response to the writ issued under said petition, the respondent, as directed, produced the said child in court and made return to the writ as follows.

A motion to quash the writ was made upon the ground that the petition failed to disclose that the petitioner has any legal right to maintain the action, for the reason that the charter under which it was organized gives it no right of guardianship over the
89 children committed to its care and custody; that its authority is limited to the reception in its institution of infants of the age of two years or under found in the city of New York, who have been abandoned or deserted, and such as are surrendered to it under the provisions of its charter, and to keep within said institution said infants during their minority; and that said charter does not confer upon said institution the right to make any such disposition of said children as was made by the petitioner as set forth in its petition, and that by making such disposition the said petitioner has lost such power, right and authority as may have been conferred upon it by the charter of the State of New York to retain the custody and control of said infant.

The respondent, by way of plea in abatement, set up that the petitioner had no right to maintain the action, for the reason that it appears upon the face of the petition that the petitioner is a foreign corporation and has not filed a copy of its articles of incorporation or charter or the appointment of an agent resident within the territory upon whom process may be served, as provided in Chapter 10 of the Revised Statutes, and the amendments thereto.

By way of further return, respondent alleged that letters of guardianship of the person of the child named in the petition were granted to the respondent by the probate court of Graham County,

Arizona, and that said respondent, under and by virtue of
90 said letters of guardianship, has duly qualified as such guardian by taking the oath and giving the bond required by law and the order of said court; and that thereupon respondent became, was, and now is, the legally appointed and acting guardian of said child; that upon the hearing of the application for said letters of guardianship the petitioner appeared and from the order of said court appointing respondent guardian as aforesaid it has taken an appeal to the district court of the Second Judicial District of the Territory of Arizona.

The respondent further made return that the child charged in the petition to be unlawfully in the custody and control of respondent is a white, Caucasian child of the Anglo-Saxon race; that the petitioner, on or about the first day of October, 1904, brought the said child to the Territory of Arizona and abandoned him to the keeping of a Mexican-Indian, whose name is unknown to the respondent, and who was and is financially unable properly to feed, clothe, shelter, maintain and educate said child, and is otherwise, by reason of his race, mode of living, habits and education, entirely unfit to have such care, control and education of said child; that the said person to whom petitioner abandoned said child voluntarily surrendered said child to certain persons, who thereupon placed said child in the care, custody and control of respondent; that respondent is a fit person to have the care, custody and control of
said child, and that it will be to the best interest of said child
91 that he be permittted to remain within the care, custody and control of respondent, whose purpose and intention it is to rear, maintain, educate and provide for said child in all things as though he were his own.

The motion to quash the writ was denied and the plea in abatement was overruled. The petitioner's motion to strike was denied, and its demurrer to the return overruled.

Application for writs in sixteen other cases, involving the custody of sixteen other children, were brought by the petitioner. The petitions in those cases were similar to that filed in the case against John C. Gatti; the return in each of those cases was likewise similar to the return made in the Gatti case. In response to the writs the children were all produced in court.

By stipulation entered into between the counsel for the petitioner and the counsel for the several respondents, it was agreed that the proof adduced in the trial of the application for the writ of *habeas corpus* in the case of John C. Gatti, the pleadings, and the testimony taken, should be taken, applied to and considered by the court as filed, taken and applied in each of the other cases for writs of *habeas corpus* brought by the petitioner, and that each of said cases should abide the result of the determination of the case of John C. Gatti. The case was thereupon tried upon the issues of fact raised by the petition, the return, and an amended traverse to the return filed by the petitioner.

The testimony was heard in open court before the full
92 bench, and, in accordance with the stipulation, was permitted to embrace all the facts deemed relevant and material to all the cases before the court.

The testimony and evidence show the following facts:

The New York Foundling Hospital is a corporation organized and existing under the laws of the State of New York for the purpose of caring for abandoned and deserted infants found in the city of New York, and such as may be voluntarily surrendered to it, of the age of two years or under; the Act amending its charter providing that it should be under the care, management, and control of the religious order known as the "Sisters of Charity."

While the Act amending the charter of the hospital does not in terms authorize the institution so to do, it is shown that it has been, from the organization of the hospital, the practice of its managers to place infants of suitable age in homes within and without the State of New York, to be cared for, reared, supported and educated in such homes by the persons to whom they are given, and that it so places some 450 children each year, that the hospital authorities retain the right to visit such homes and to maintain a supervision over said children until they become of age. The evidence does not disclose the nature or extent of this supervision, nor the method by which it is exercised.

During the summer of 1904, the hospital authorities received a letter from a priest temporarily in charge of the parish of Clifton and Morenci, requesting that a certain number of children
93 be sent from the institution to Clifton and Morenci to be placed within the homes of certain of his parishioners, who were represented by said priest to be of the Spanish race, but to be persons who spoke the English language; that it was the desire of these people that only children of fair complexion be sent.

In response to the application and upon the representations made by the priest, forty children were sent by the petitioner under the charge of Sister Anna Michella and two other Sisters of Charity, and an agent by the name of Swayne, consigned to the persons whose names had been previously supplied by the priest. These children were of the Caucasian race, and, as requested by the said priest, chosen from among those in the institution who were fairest and lightest in complexion; they were all children of unusual beauty and attractiveness; their ages were from eighteen months to five years. To the clothing of each child was attached a tag, giving the band number of each child, the name of the person to whom consigned, and the name and date of birth of the child. To each person to whom a child was assigned was sent a letter signed by the sister superior, requesting that the consignee, within a week after the reception of the child, fill out a blank which was enclosed, containing the name of the child, the name of the foster parents in full, the business occupation and the post office address of such foster parents, and forward the same to the hospital authorities. The letter also requested that the person to whom each child was
94 assigned should write yearly, about the first of May, how the child was progressing, and giving other items of interest.

On the evening of October 1, 1904, the children, in charge of said sisters and agent, arrived in Clifton in a special car. It having become a matter of notoriety in Clifton that a number of children were to arrive to be distributed to Mexican families, a crowd of Mexicans gathered at the station on the arrival of the train, together with a few American women of good families, the latter being attracted by curiosity and a desire to see the children, who, they supposed, were Mexicans. The children consigned to the persons in Clifton were taken from the car by those in charge of them, the Americans present assisting in taking them out. The latter were told by the agent that no disposition of the children to the Mexican families would be made that night, and, on being asked by one of the American women, he said that in the morning an opportunity would be given her to make an application for one of the children.

Upon the arrival of the train the priest came into the car, and Sister Anna Michella then asked him what sort of people they were to whom the children were to be allotted. He thereupon said that they were all good American citizens, moral, and had no children of their own, and that the homes were all that could be wished for. Having noticed that some of the people were not as fair in color as she had hoped for and expected, the sister asked him if there
95 would be any half-breeds among them, and he said "No." She asked him how the people lived, and he replied that they lived in frame houses. She then stated to him that it was the rule of the home that the children were only placed out on trial until such time as the homes could be visited by the sisters, and that if it were found that any of the homes were not as expected the children would be removed.

The children to be left at Clifton were taken to the priest's house, and fifteen of them, under the supervision of the priest, were turned over that night to the persons to whom they were consigned. No visit to or examination of the homes of these people was made at any time, either by the agent Swayne, the Sisters in charge of any one on behalf of the petitioner. They relied entirely upon the statements of the priest.

The evidence establishes, without contradiction, that the persons to whom the children were given as assigned, both in Clifton and Morenci, were wholly unfit to be entrusted with them; that they were, with possibly one or two exceptions, of the lowest class of half-breed Mexican-Indians; that they were impecunious, illiterate, unacquainted with the English language, vicious, and, in several instances, prostitutes and persons of notoriously bad character; that their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs; that many of them had children of their own, whom they were unable properly to support. Sister Anna Michella, who was entrusted with the matter of carrying out
96 the instructions of the hospital authorities, was so struck by the unfitness of these people that in three instances she refused to allow the children to be delivered, and in other instances, as testified to by a witness, gave them up "with tears streaming from her eyes;" and from her own testimony it appears that she was not

satisfied with the people to whom they were to be delivered, but that she felt she could not over-ride the authority of the priest.

On the morning of the second of October it became generally known to the American residents of Clifton that the children had been distributed the night before to these people. Much indignation was immediately aroused, and an informal conference of citizens was held to discuss the matter of the distribution of the children which had been made. A committee was appointed to go to Morenci and ascertain from the priest and the agent, Swayne, their purposes, and to inform them as to the feeling excited among the Americans over the distribution of these white children to these half-breed Indian families. This committee was composed of one Jeff Dunagan, a deputy sheriff, and one Thomas Simpson. The committee left Clifton about 1 o'clock in the afternoon and arrived in Morenci shortly after 2 o'clock in the afternoon. They immediately went to see Mr. Mills, the superintendent of the copper company operating at that place, one of the leading citizens of the town, and, in company with him, went in search of the agent Swayne, whom they found at the hotel. Dunagan then stated to the agent the feeling
97 which had been aroused in Clifton, their purpose in visiting Morenci, and asked him what he would do in the matter.

Both Dunagan and Simpson testified that in response to their inquiries the agent, Swayne, said that he knew his business, and did not propose to be dictated to by the people; that the children "had been placed and would stay placed." The testimony of Swayne qualifies the statements of Dunagan and Simpson as to what was said by him on that occasion. But whatever may have been the precise reply made by Swayne, it is not disputed that Dunagan and Simpson telephoned the information to the people in Clifton that they had seen Swayne and that his reply was that he would not do anything; that the children had been placed and would stay placed.

Upon the receipt in Clifton of this information so telephoned, a meeting of the citizens was held and a committee of twenty-five persons was named to collect the children from the people to whom they had been consigned, and to bring them to the principal hotel of the place. The members of the committee then visited the various homes of the persons having possession of the children and stated to the latter that they had been sent by the American residents to take the children from their possession; in each instance the children, without protest, were voluntarily surrendered, and were thereupon taken to the hotel.

Upon the arrival of the train in Clifton all the children were neatly clad, cleanly in appearance, and gave every evidence
98 of careful nursing and proper attention. When the children were obtained from these people they were in a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects of coarse Mexican beans, chilis, watermelons, and other improper food which had been fed them; and, in some instances, from the effect of beer and whiskey that had been given them to drink. Upon the arrival of the children at the hotel certain good women of the place took charge of them, nursed them

and secured medical care and attention for them. On the next day the children were given to the several respondents in these cases, who have since had them in their care, custody and control.

The agent, Swayne, and the priest on the night of October 2nd returned with Dunagan and Simpson to Clifton, arriving there in the early morning. Citizens, to the number of two or three hundred, had assembled and were waiting for their return. At this meeting much excitement was manifested, but no act of violence was done at that or any other time; some threats, however, of a general character were made by certain persons against the agent Swayne. Both Swayne and the priest made a statement of their position at this meeting. Swayne at that time was apprehensive that he might receive bodily harm. In his statement at the meeting he said that the children were placed temporarily in charge of the people to whom they had been consigned, but the understanding was that the
99 sisters were to remain for a matter of two or three weeks, and if it were found by them that any of the children were placed in improper homes they would be taken from such homes and replaced. He protested against the taking of the children by the American residents; and neither by his consent nor that of the sisters were the children either taken from the homes in which they had been placed or given to the respondents. On the next day other meetings were held, at which both the priest and Swayne were present. The Clifton children were not given up to the sisters or the agent by the people who had taken them in charge, for the reason that they feared if so returned the children might be again placed in equally unfit homes of Mexican-Indians elsewhere.

In Morenci, after the distribution of the children, and after the fact had become known, the same indignation was aroused among the American citizens and much the same course was pursued as in Clifton. Mr. Mills, in company with others, called upon the sisters and upon agent Swayne, and remonstrated with them against permitting the children to remain with the people to whom they had been distributed. As a result of these remonstrances and a statement by Mr. Mills that the American residents of Morenci would not suffer the children so to remain, the priest and the agent, Swayne, visited the homes of the Mexicans having the children and obtained a surrender of them and brought them to the hotel; and these children, with the exception of three, who were turned over at the request of
100 Dunagan to be distributed among American residents, were subsequently taken back by the sisters and the agent to the east, and there placed in homes. It is shown by the testimony of Sister Anna and the agent, Swayne, that they would not have given the three Morenci children to Dunagan except that they then believed that the people of Morenci would not permit any of the children to be taken away by them.

It is clearly established by the proof in the case, and it is not disputed, that each of the respondents is a fit and proper person to have the care, custody and control of the children; that they are people of sufficient means properly to care for and educate the children, and that they are fit persons, by reason of their character, standing, and

age, to have and maintain such care, custody and control; that without exception they have become attached to the children, and the children have become attached to them, and that each desires to retain the particular child which he has, in order that he may rear the same as one of his own household.

On the 16th of October, applications were made by the respondents to the probate court of Graham county, Arizona, for letters of guardianship of the person of the child which each possessed; hearings were had, at which this petitioner was represented by counsel, and in each instance letters of guardianship were granted in accordance with said application, and each of said respondents duly qualified as such guardian. Thereupon this petitioner took an
101 appeal from the order granting said letters of guardianship in each case to the district court of Graham county. Pending said appeals these petitions were filed, and in response to the writs the children were brought before this court.

Opinion.

KENT, C. J. (after stating the facts as above):

This proceeding, though not presenting questions difficult of determination or points of law that are novel, is unusual in many of its features, and is important as determinative of the disposition and welfare of a number of little children ignorant of the contest that is being carried on in regard to them. Our decision will determine the question of their environment, the circumstances under which they shall be brought up, the foster parents and homes they are to have, and will affect their future probably to a greater degree than any one circumstance that can now come into their lives. The importance to them of a proper determination of this proceeding has caused us to adopt the unusual procedure of hearing the evidence orally before the full bench, and we deem it proper, although the case has only in the past few days been closed, to determine the matter now while all the parties concerned are before the Court, and to state the facts as we find them and our conclusions somewhat at length, although opportunity has not been given to formulate them other than hastily.

The question presented for our determination, primarily,
102 is, What disposition of these children will be for their best interests: They are brought before us by the petitioner claiming its legal right to their custody. The respondents appear and claim their custody, alleging also a legal right. Whether a legal right exists, either on the one side or the other, such right is not conclusive upon us; and while it is properly a factor to be taken into consideration in determining the welfare of the children, such welfare is the controlling vital determinative fact.

The Supreme Court of Massachusetts, which that clearness of diction so frequently characteristic of its opinions, has in the case of Woodworth *v.* Spring, 4 Allen, 321, the parent case often cited and followed, so fully covers the law upon this subject that we deem it

desirable to quote here the greater portion of that opinion. Speaking through Mr. Chief Justice Bigelow, the Court, in that case, said:

"The child, whose custody is in controversy in this case, is legally domiciled in the State of Illinois. That was his domicil of origin; and as he has had, hitherto, no legal capacity to acquire a new one, and as the guardian appointed in the place of his origin, has never intended to change the domicil of his ward, that of his birth still continues. Story Confl. Laws, par. 46. In determining the question of his legal custody in this commonwealth, he is therefore to be regarded as a foreign child who is lawfully within the jurisdiction of this state, having been brought within its limits, not forcibly or clandestinely, but with his own consent and with that of the petitioner, his duly appointed guardian under the laws of Illinois, who had the lawful custody of his person in that state. So much seems to be clear; and if the right to the possession and control of the person of the child depended on his domicil, the right of the
103 petitioner to claim the custody of his person would be indisputable. But we are unable to see that the facts that the child was born in another state, and that he has never by an act or election of his own or of his guardian obtained a new home here, have a decisive bearing on the question at issue in the present case. He is now lawfully within the territory and under the jurisdiction of this commonwealth, and has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or of the place where they may be legally domiciled. Every sovereignty exercises the right of determining the *status* or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing in the territory and within the jurisdiction of an independent government. Effect may be given by way of comity to such laws by the judicial tribunals of other states and countries; but, *ex proprio vigore*, they cannot have any extra-territorial force or operation. The question whether a person within the jurisdiction of a state can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicil but on his rights and obligations as they are fixed and determined by the laws of the state or country in which he is found. * * * The comity of a state will give no effect to foreign laws which are inconsistent with or repugnant to its own policy, or prejudicial to the rights and interests of those who are within its jurisdiction. Even the parental relations, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. The *patria potestas* of a foreign parent over his child is not that which is vested in him by the laws of the place or his domicile, but that which exists by virtue of the parental relation in the country where the father seeks to enforce his authority. These well settled principles are founded on the necessity of securing and preserving to every state the exclusive sovereignty and jurisdiction within its own territory, and avoiding the confusion and conflict of rights and remedies

which would ensue from attemping to give extra-territorial effect to the varying laws of different countries. *Statuta suo cluduntur territorio, nec ultra territorium disponunt.* Every nation has an exclusive right to regulate persons and property within its jurisdiction according to its own laws, and the principles of public policy
104 on which its own government is founded. It results from these principles, that persons exercising offices and trusts with which they are clothed by virtue of the laws of a particular state or country cannot undertake to transfer their power or capacity to act, so as to control persons or property situated beyond the limits of the jurisdiction of the government or sovereignty from which their authority is derived. An administrator appointed under the laws of a foreign state cannot act as such in this commonwealth. Nor, for like reasons, can a guardian appointed by virtue of the statutes of another state exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the jurisdiction of the government which clothed him with the office. Story Confl. Laws, par. 499. * * * So far, therefore, as the claim of the petitioner to the custody of the child in the present case rests on a supposed rightful authority to control his person in this commonwealth, by virtue of his appointment as guardian in the State of Illinois, it is not suported either on principle or authority. He cannot assert his tutorial power, *de jure,* in our courts or within our territory.

"But it by no means follows that his claim to the care of the child and the control of his person, and to the privilege of removing him from this commonwealth, is to be absolutely denied. On the contrary, it is the duty of the courts of this state, in the exercise of that comity which recognizes the laws of other sates when they are consistent with and in harmony with our own, to consider the *status* of guardian which the petitioner holds under the laws of another state as an important element in determining with whom the custody of the child is to continue. It would not do to say that a foreign guardian has no claim to the care or control of the person of his ward in this commonwealth. If such were the rule, a child domiciled out of the state, who was sent hither for purposes of education, or come within the state by stealth, or was brought here by force or fraud, might be emancipated from the control of his rightful guardian, duly appointed in the place of his domicil, and thus escape or be taken out of all legitimate care and custody. But in such cases the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another state as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly states having similar laws and usages
105 should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicil. And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to which he might be entitled under our laws, and would be conducive

to his welfare and promote his interests, it would be the duty of the court to award to the foreign guardian the custody of the person.

"Nor can we see that the appointment of a guardian over the minor by the probate court in this commonwealth operates to bar any decree by this court in favor of the foreign guardian, awarding to him the cusody of his ward. Such an appointment might be expedient and proper for the purpose of clothing some one in this commonwealth with authority over the person of an infant for his protection and security against any unauthorized interference or control. But it certainly would not conclusively settle his permanent *status* or condition, so long as he remained an infant, or prevent his being removed from the commonwealth by the guardian appointed in the place of his domicil, if the interests and welfare of the ward rendered such removal expedient or necessary. No doubt, so long as the child continues within this jurisdiction, the guardian appointed in the courts of this state would have the exclusive right to the custody of his person. But the decree of the probate court does not deprive this court of the power to adjudicate and determine the question of the proper custody of the child as between a domestic guardian and one appointed in the place of the domicil of the infant. The jurisdiction of this court to decide, on *habeas corpus* or other proper process, concerning the care and custody of infants, is paramount, and cannot be taken away by any decree of an inferior tribunal. * * * The result is, that neither of the parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the court. But it is for this court to determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, to whose custody he shall be committed."

It will be noted that the case from which we have quoted differs from the proceeding before us in that in the Massachusetts case the child was in that jurisdiction without the intent of its guard-
106 ian to change its domicil to that state; while here the still stronger reason exists for following the doctrine enunciated, in that the petitioner in the exercise of its custody and control over the children voluntarily brought them to this jurisdiction with the conceded intention of changing their domicil by placing them in the homes in this territory it then believed to be suitable ones. Following the law as we find it, and with it we are in full accord, we do not deem it important to the main issue to be decided to pass upon the contention of the respondents that the charter of the petitioner gives it no right either to place these children in homes or to reclaim them for any cause after they have been so placed; that the petitioner has no rights of guardianship; that whatever rights the petitioner has have no extra-territorial force, and can avail such institution nothing outside the State of New York; that if the petitioner has a right to place such children in homes, then admittedly it is a part of its business, and in placing these children in the homes here it has been carrying on such business in this territory, and having done so without complying with the territorial laws respecting the filing of its articles and the appointment of an agent, it can not now, under our

law, maintain this proceeding founded on such business so done here. If the subject-matter of this proceeding were other than that of the custody of children, the legal propositions advanced by the respondents would merit careful attention; but in this proceeding it is
107 sufficient to say that we do not recognize any of them as a bar to the proceeding brought by the petitioner, and that we recognize its right to present this application, and the power of the court under this application to award the petitioner the relief it seeks, if it be for the best interests of the children so to do.

Similarly it is not necessary for us to determine whether the petitioner is correct in its position that the letters of guardianship issued to the respondents by the probate court of Graham county give the respondents no legal right to the custody of the children, for the reason that an appeal having been taken to the district court where a trial *de novo* must be had, such appeal vacates the order of appointment and the letters issued thereunder; for if the letters be valid and the respondents the appointed guardians thereunder, such fact is in no way controlling upon us, and is but one of the surrounding circumstances at which we should look in the interests of the children.

We hold, therefore, that under the facts as we find them neither the petitioner nor the respondents have any such legal claim as authorizes us for that reason to award to either of the parties the care and custody of these children.

We have, then, to decide what disposition must be made of the children to subserve best their welfare. The petitioner has frankly conceded that a great blunder was committed in the consignment and delivery of the children to these degraded half-breed Indians. The evidence satisfies us that it was an unintentional blunder on
108 the part of the institution, and was caused by the misleading and inaccurate report of the local priest, who was not connected with the institution, and was a foreigner and unacquainted with existing conditions; that such blunder was not remedied at the time because of the tactless stubbornness of the agent and the feeling of the sister in charge that she must bow to the authority of the priest, who insisted upon such disposition. We recognize the desire of the institution to right now, and to right itself the wrong done these children, and to secure for them now suitable homes to be chosen by it; and, with the record of its great service to humanity in the past, we have no doubt of its purpose and ability to do so: but as, in the full light of the history of this transaction, shown by the evidence adduced at the trial, of which the institution so far away can hitherto have had but partial knowledge, it appears that the mistake, as originally made, was made by one not connected with the petitioner, and that the ultimate purpose of the institution, that of finding suitable homes for their children, has in this instance already been accomplished, we do not believe that the best interests of these children will be promoted by allowing the petitioner to adopt the course which it desires.

The counsel for petitioner has eloquently argued to us that the interests of these children will best be subserved by allowing this institution to take them to the east and there place them in homes

far removed from the knowledge of their antecedents, which
109 by reason of the recent events has become so general where the respondents live. This argument would have great weight if we could be led to believe that a mere change of foster parentage would insure a condition of ignorance of the circumstances of their birth and desertion, either in the children when they come to years of discretion, or in the friends and families of their adoption. There can be at most but a chance that such would be the result. As it is, these present foster parents, persons of some means and education, from the day when, with humanitarian impu[lse] actuated by motives of sympathy for their pitiful conditio[n] assisted in the rescue of these little children from the evil into [which] they had fallen, down to the time of their attendance at this tri[al] at cost of much time and money, in their loving care and attention have shown that more than ordinary ties of affection bind them to these children, and that in no other homes that can be found for them are they so likely to fare as well. We feel that it is for their best interests that no change be made in their custody, and that, if anywhere, here in the changing West, the land of opportunity and hope, these children as they grow to manhood and womanhood will have the fullest opportunity that it is possible for them to have to be judged, not upon the unfortunate condition of birth, but upon the record they themselves shall make, and the character they shall develop.

The writ will be dismissed in this and the other cases.

EDWARD KENT, *C. J.*

110 We concur:

RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*
GEO. R. DAVIS, *A. J.*

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. New York Foundling Hospital *vs.* John C. Gatti. Opinion. Filed Jan. 21, 1905. S. M. Cullom, Clerk.

111 In the Supreme Court of the Territory of Arizona.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL for Writ of *Habeas Corpus.*

Application and Notice of Appeal.

The above named petitioner, The New York Foundling Hospital, conceiving itself aggrieved by the final order entered on the 21" day of January, 1905, in the above entitled proceeding and court against it, the said The New York Foundling Hospital, and in favor of the respondent John C. Gatti, does hereby appeal therefrom to the Supreme Court of the United States, and does hereby pray that its

said appeal be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, order and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

THE NEW YORK FOUNDLING HOSPITAL,
By EUGENE S. IVES,
THOMAS D. BENNETT.

And now, to-wit, on the 21" day of January, 1905, the above application having been duly presented and considered, it is hereby

112 Ordered that the appeal prayed for be allowed, and the same is hereby allowed, on filing a good and sufficient bond for costs in the sum of One thousand dollars.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. In the Matter of the Application of the New York Foundling Hospital for a Writ of *Habeas Corpus*. Application and Notice of Appeal. Eugene S. Ives, and Thomas D. Bennett, Attorneys for Applt. Filed Jan. 21, 1905. S. M. Cullom, Clerk.

113 *Bond.*

Know all men by these presents: That we, the New York Foundling Hospital, as principal, and the National Surety Company, a New York Corporation, having its principal office in the City, County and State of New York, and duly authorized to do business in the Territory of Arizona, as surety, are held and firmly bound unto the appellee John C. Gatti, in the full and joint sum of One Thousand dollars, lawful money of the United States, to be paid to him, the said obligee herein, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of January, 1905.

Whereas the above named principal The New York Foundling Hospital, has prosecuted an appeal to the Supreme Court of the United States, the same having been duly and properly allowed, from a final order rendered against it and in favor of the said obligee herein in the Supreme Court of the Territory of Arizona, to reverse the order rendered in said Court.

Now therefore, the condition of this obligation is such that if the above named principal and obligors herein shall prosecute their said appeal to effect and answer for all costs if they fail to make said ap-

peal good, then this obligation shall be void otherwise the same shall be and remain in full force and virtue.

114 THE NEW YORK FOUNDLING HOSPITAL,
By SISTER ANNA MICHELLA, *Assistant Secretary.*
THE NATIONAL SURETY CO.,
By H. I. LATHAM, *Attorney in Fact.* [SEAL]
AND J. L. B. ALEXANDER, *Attorney in Fact.* [SEAL]

Approved:
EDWARD KENT, *Chief Justice.*

Jan. 21st, '05.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. In the Matter of the Application of the New York Foundling Hospital for Writ of *Habeas Corpus.* Appeal Bond. Eugene S. Ives and Thomas D. Bennett, Attorneys for Appl't. Filed Jan. 21, 1905. S. M. Cullom, Clerk.

115 *Affidavit of Eugene S. Ives.*

In the Supreme Court of the United States.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL for Writ of *Habeas Corpus.*

TERRITORY OF ARIZONA, *County of Pima, ss:*

Eugene S. Ives being duly sworn, deposes and says that he is one of the attorneys for the petitioner appellant, The New York Foundling Hospital; that an appeal was duly allowed by the Supreme Court of the Territory to the Supreme Court of the United States on or about the 21" day of January, 1905; that the New York Foundling Hospital is a corporation with its principal place of business in the city of New York, and that its regular counsel is Chas. E. Miller, Esq., Attorney-at-Law, whose place of business and residence is in the city of New York; that deponent has a proposed statement of facts to be presented to the Supreme Court of the Territory for finding and sent the same to the said Miller in order that he might examine them before they are finally presented to the Supreme Court; that deponent has not as yet heard from the said Miller in reply thereto, and that deponent believes the interest of the petitioner-appellant requires that the said statement of facts should not be presented for finding until examined by the said Miller. That the time

116 within which the said transcript must be filed in the Supreme Court of the United States will expire on or about the 21" day of March, 1905.

EG. S. IVES.

Subscribed and sworn to before me this 13" day of March, 1905.
My commission expires May 29", 1907.
[SEAL] JOSIE B. HENDERSON,
Notary Public.

(Endorsed:) No. 209. Supreme Court, United States. In the Matter of the Application of The New York Foundling Hospital for Writ of *Habeas Corpus*. Affidavit. Filed Mch. 15, 1905. S. M. Cullom, Clerk. By Angie B. Parker, Deputy.

117 In the Supreme Court of the United States.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL for Writ of *Habeas Corpus*, Appellant

Assignment of Errors.

The petitioner-appellant hereby assigns the following errors committed by the Supreme Court of the Territory of Arizona:

I.

The Supreme Court erred in overruling the demurrer of the petitioner to the return, for the reason that it appeared upon the face of the said return that the petitioner had duly perfected its appeal from the order of the Judge of the Probate Court issuing letters of guardianship to the respondent, and that the said order thereupon by virtue of paragraph 1952 of the Revised Statutes of Arizona became *ipso facto* null and void.

II.

The Supreme Court erred in denying the motion of the petitioner to strike out all that portion of the said return which set forth the issuing of letters of guardianship to the respondent, for the reason stated in assignment No. I.

III.

The Supreme Court erred in ordering that the writ be dis-
118 missed for the reason that it appears by the statement of facts found by the Supreme Court that the respondent obtained the custody of the said child unlawfully and by force, and had no right whatever to the custody of the said child.

IV.

The Supreme Court erred in ordering that the writ be dismissed, for the reason that it appears by the statement of facts found by the Supreme Court that the petitioner was entitled to the custody of the said child.

V.

The Supreme Court erred in ordering that the writ be dismissed, for the reason that under the facts and the law, petitioner was entitled to the custody of the said child.

All of which is respectfully submitted.

EGE. S. IVES,
Attorney for Petitioner-Appellant.

(Endorsed:) No. 209. Supreme Court, United States. In the Matter of the Application of the New York Foundling Hospital for Writ of *Habeas Corpus*. Assignment of Errors. Filed March 30, 1905. S. M. Cullom, Clerk.

119 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 9th day of January, A. D., 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 202.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus*.

On motion of Mr. W. C. McFarland, attorney for Respondents herein, It is ordered that the hearing of this cause be set for Thursday, January 12th, 1905.

On motion of Mr. T. D. Bennett, attorney for Petitioners herein, It is ordered that one Return be sufficient for all the cases numbered from 202 to 218, inclusive.

And afterwards and upon to-wit the 12th day of January, A. D. 1905, the same being one of the regular juridical days of the January Term, A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

120 No. 209.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus*.

Comes now Mr. E. S. Ives, Attorney for Petitioner herein, and moves that he be heard on application to file Amended Petition It is ordered that said Motion be granted.

It is further ordered that the Petitioner herein be allowed to file Amended Petition.

On motion of Mr. E. S. Ives, Attorney for Petitioner herein, It is ordered that he be granted permission to file Demurrer and Motion.

And afterwards and upon to-wit the 14th day of January A. D., 1905, the same being one of the regular juridical days of the January Term, A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 209.

THE NEW YORK FOUNDLING HOSPITAL, a Corporation, Petitioner,
vs.
JOHN C. GATTI, Respondent.

It is ordered that the Motion of Respondent to Quash the Writ, be and the same is hereby denied.

It is further ordered that the Demurrers of the Petitioner herein to the Return of Respondent be and the same are hereby overruled.

It is further ordered that the Motion filed herein by Petitioner to strike out certain portions of Respondent's Return, be and the same is hereby denied.

121 And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

It is ordered that the hearing of this cause be set for this afternoon at 1:30 o'clock.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

This cause coming on for hearing, two witnesses for Petitioner were sworn and examined. The hour for adjournment having arrived, It was ordered by the Court that this cause be continued until Monday morning, January 16th.

And afterwards and upon to-wit the 16th day of January, A. D., 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order,
122 *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

On motion of Mr. E. S. Ives, It is ordered that he be granted leave to file Amendment to Petitioner's Traverse to Return, Par. III.

This cause coming on for hearing, three witnesses were sworn and examined and cause continued until this afternoon.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

This cause coming on again for hearing, two witnesses were sworn and examined for Petitioner.

Comes now Mr. W. C. McFarland, attorney for Respondent herein, and moves that the affidavit of Mr. Bull be read, counsel
123 for Petitioner objecting. It is ordered that said motion be submitted.

Five witnesses on behalf of Respondent were sworn and examined. The hour for adjournment having arrived, It is Ordered that this cause be continued until to-morrow morning, January 17th.

And afterwards and upon to-wit the 17th day of January A. D. 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

This cause being continued from yesterday, eight witnesses were sworn and examined on behalf of Respondent, and cause continued until this afternoon.

It is ordered that the motion of Mr. W. C. McFarland, attorney for Respondent herein, to read the affidavit of Mr. Bull be and the same is hereby denied.

And afterwards and upon to-wit the same day the following
124 other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

The hearing of this cause being resumed four witnesses were sworn and examined on behalf of Respondent.

On motion of Mr. Ives, Attorney for Petitioner herein, It is ordered that he be granted leave to file Stipulation.

Comes now Mr. Walter Bennett, attorney for Respondent herein, and moves for unlimited time for argument in this cause. It is ordered by the Court that said motion be and the same is hereby denied.

On motion of Mr. E. S. Ives, attorney for Petitioner herein, It is ordered that one hour and ten minutes be granted each side for argument.

This cause was argued by Mr. Thos. Bennett and Mr. Eugene S. Ives for Petitioner and by Mr. W. C. McFarland and Mr. Walter Bennett for Respondent and cause ordered submitted.

And afterwards and upon to-wit the 21st day of January, A. D. 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter*
125 *alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:—

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

This cause having been heretofore submitted and by the Court taken under consideration and the Court having considered the same and being fully advised in the premises:

It is ordered that the Writ of *Habeas Corpus* issued in this cause be, and the same is hereby, dismissed.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

In the Matter of the Application by THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus*.

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

Whereas, a Writ of *Habeas Corpus*, directed to John C. Gatti, was on the 2nd day of January, 1905, issued out of this Court
126 upon the application of the above-named petitioner in behalf of William Norton; and

Whereas, on the 10th day of January, 1905, the said John C. Gatti, in obedience to said Writ of *Habeas Corpus*, produced the body of the said William Norton, before this Court and made answer and return to said Writ of *Habeas Corpus;* and

Whereas, on the 12th day of January, 1905, the said petitioner made reply to and traversed said answer and return; and

Whereas, upon full consideration of the Writ, the Return, and the Traverse, and of all the evidence introduced on the part of the petitioner, as well as on the part of the respondent, it appears to the Court:

That the said William Norton is a minor, of the age of two and a half years; that the best interests of the said William Norton require that the said John C. Gatti have the care, custody and control of the said William Norton; and that the said John C. Gatti, respondent, has not illegally restrained said William Norton of his liberty.

It is therefore ordered, adjudged and decreed, That the said William Norton be, and he is hereby, remanded to the care, custody and control of the said John C. Gatti, respondent, and that the said John C. Gatti do retain the care, custody and control of the said William Norton.

It is further ordered that the respondent, John C. Gatti, do have and recover of the petitioner, the New York Foundling
127 Hospital, a corporation, his costs and disbursements herein, taxed at Seven hundred ninety-one and 80/100 ($791.80) dollars.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 209.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

Comes now Eugene S. Ives, Esq., attorney for Petitioner herein, in open court, and gives notice of appeal from the judgment of this

Court, to the Supreme Court of the United States, and moves the Court that the appeal be allowed and that it fix the amount of the Cost Bond on appeal.

It is ordered by the Court that said Motion be granted and the appeal be and the same is hereby allowed.

It is further ordered that the amount of the cost bond be fixed in the sum of one thousand ($1,000.) dollars.

128 In the Supreme Court of the Territory of Arizona.

No. 209.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus*, JOHN C. GATTI, Respondent.

Tried at Phœnix, Arizona, January 14, 16, 17, 1905, before the full bench of the Supreme Court of Arizona.

Mr. Chief Justice Kent, presiding; Mr. Justice Sloan, Mr. Justice Doan, and Mr. Justice Davis, Associates.

E. S. Ives, Esq., and T. D. Bennett, Esq., for petitioner.

Walter Bennett, Esq., and W. C. McFarland, Esq., for respondent.

Frederick S. Nave, Esq., United States Attorney for Arizona, special counsel on behalf of the Court.

Reporter's Transcript.

W. N. Tiffany, Reporter.

129 SATURDAY, *January* 14, 1905, 1:30 p. m.

The parties to this proceeding all being in court in person and represented by their respective counsel, the matter was called on for trial; whereupon the following proceedings were had, to-wit:

Mr. IVES: Since I got out of court this morning on the other case in which I am engaged, I have given considerable reflection to this case, in view of the decision of the Court upon the demurrers this morning, and it will be utterly impossible to finish it today—that is simply out of the question; and it is my belief that if given time for a little reflection and study ultimate time will be saved, if the case be continued until Monday morning. In other words, I believe I can so shorten my testimony that it will be for the benefit of everybody eventually. If compelled to go into the case this afternoon, in a condition of some uncertainty in respect to one phase of the case, I will have to put in a lot of testimony which it might be I could eliminate; and I would therefore respectfully ask that the Court permit this case to be continued until Monday morning.

Mr. Chief Justice KENT: We considered that matter informally before we came into court; and it seems to us the contrary would be true, and that we would facilitate the expedition of it if we went into the case to some extent this afternoon. We think it should proceed at this time.

130 SISTER ANNA MICHELLA, called as a witness on behalf of the petitioner and duly sworn, testified as follows:

Examined by Mr. T. D. BENNETT.

Mr. BENNETT: If it please the Court we offer in evidence exemplified copy of the laws, Chapter 635, entitled "An Act to Amend the Charter of the Foundling Asylum Sisters of Charity of the City of New York.

Defendant objects to the offer on the ground that the act only purports to be an amendment to the original act and the original act is not offered.

Mr. WALTER BENNETT: I think the amendment is incompetent without the original act.

(Objection overruled by the Court and respondent excepts to the ruling. Documents filed as Exhibit A for the petitioner.)

Mr. T. D. BENNETT: We offer in evidence also the record of the Clerk of the Court of the County of New York, Clerk of the Supreme Court of said State for said County concerning the change of the name. It is only a formal matter—the change of the name from the original incorporated name to the present incorporated name under which the suit is brought.

Respondent objects to the introduction of the document for the reason that no such document is pleaded in the petition or any allegations whatever of any change of name in the petition.

Mr. T. D. BENNETT: We sugest that the petition is brought in the present name of the corporation. This is the record of the Court showing that the original which was founded and incor-
131 porated under one name has been subsequently changed in name only.

The COURT: Does this show that the name shown in this document as now offered is the name under which the institution was known at the time the act was passed?

Mr. T. D. BENNETT: Yes, sir.

The COURT: So that you wish to show the change of name from the time the act was passed?

Mr. T. D. BENNETT: Yes, sir.

(Objection overruled by the Court and respondent excepts to the ruling. Document filed as Exhibit B for the petitioner.)

Q. What is your name, your full name?

A. Sister Anna Michella.

Q. What if any official relation or position do you sustain towards the New York Foundling Hospital?

A. I am Assistant Secretary of the New York Foundling Hospital.

Q. How long have you been associated with the New York Foundling Hospital.

A. Over 21 years.

Q. What is the nature of your duty and your interest with the corporation?

A. I am Assistant Secretary of the New York Foundling Hospital.

Q. And your duties?

A. To look after the little ones; in placing them out at homes and

their interest and so on. I am answerable for all the work
132 of the books and the financial affairs of the institution.

Q. On or about the latter part of last September what if any business did you do for that corporation?

A. I was sent out with a party of little children to be placed in homes—about 57 in number, and 17 we have placed in homes in Missouri and elsewhere; we arrived in Clifton October 1st, Saturday evening with a number of 40 little ones who were to be assigned to homes in Morenci and Clifton; we were to have arrived on Friday evening but on account of the washout we laid over and did not arrive there until Saturday night. Having arrived in Clifton there was quite a number of people on the platform and we had deemed it advisable to have the doors of the car locked it was a private car that we had for the children; and having been there a short while Father Mandin, the Pastor of the Church applied at the door and having been somewhat impressed that there was quite a noise outside we asked him what sort of people they were to whom the little children were to be allotted and he told us that they were all good American citizen people, moral, and had no other children of their own and that the homes were all we could wish for. Having noticed some of the people were not just as fair as we had hoped for, as he had asked for all fair children, we asked them if there would be any half breeds among them and he said no.

Q. By the word fair what do you mean?

A. I mean that they were light in complexion. Then we
133 asked how the people lived and he said they lived in frame houses and had no children of their own. Then I went on to say it was the rule of the home that our children were only placed out on trial until such time as we could visit the homes ourselves and if it was such a thing that any of the homes were not all we had hoped them to be and looked for for our children we should be obliged to remove each and every child. The Father told us that would be all right; we could be fully assured we would have perfect freedom of act in that way. He then informed us that he had made arrangements for them all——

Respondent objects to the answer.

Mr. WALTER BENNETT: We do not desire to interrupt the proceedings by making unnecessary objections. The witness is undertaking to relate a great many things which of course could not be binding upon the respondent in an ordinary lawsuit. I do *dot* know that we care to object particularly to particular portions of the testimony but we hope the Court will take notice of that which is being testified to which is immaterial.

The COURT: Of course this proceeding being in the absence of any jury counsel may rest assured that where testimony is introduced which is incompetent, the Court will not consider it.

Mr. T. D. BENNETT: The Court will advise the witness while we think there would be no intention to disregard that ruling——

The COURT: You may proceed.

(Witness continuing:) He then advised us to bring all the
134 children to his house, when we said no we would only bring those meant for the homes in Clifton. So the 16 children

were removed and brought to the priest's house and assigned to the people as the Father had called them out, who he had applied for, and with the understanding that each family should receive the child and that the child was only left there for the time being until the Sisters would go and visit each and every home. We then returned to the car and left the following morning for Morenci with the remaining 24 children. That following morning the 16 children were placed in Morenci with the same understanding as those who had been placed in Clifton.

The COURT: We would like to enquire of Counsel whether these children here are the children placed in Clifton or Morenci.

Mr. T. D. BENNETT: In Clifton; two only from Morenci.

The COURT: Do we need to go into the question of the children at Morenci?

Mr. T. D. BENNETT: Yes, sir; we certainly will have to.

A. (Witness continuing:) 15 children were placed in Morenci and after the children had been placed there we went to the Morenci Hotel and engaged rooms with the understanding that the Sisters were to remain there as long as necessary and visit the homes in Morenci and Clifton. We were only at the hotel a short time when some noise was heard in the hall, going outside found an officer who was enquiring for our agent, Mr. Swayne and saying we had made an error in placing these children with the Mexican families
135 I made reply if there had been an error we were only too happy to have that error rectified.

Q. Who was that officer?

A. Mr. Jeff Dunagan, I believe, was his name. They enquired for Mr. Swayne and when he was found he was told before having explained to the officers or any of the authorities in Morenci, that he must remove every child at once as it was the wish of the people. At that time quite a considerable large number of people had assembled in Morence and were very indignant and excited, but there was no need of it. Mr. Swayne and Father Mandin and the Assistant went out of and removed all the children in Morenci and returned them to us at the hotel. Then it was was asked about the 16 children left in Clifton and we told the officer that Mr. Swayne could go over and remove them and if necessary the Sisters would go over too because the children were so young, but they assured us it was not necessary, the hour was too late for us to go over, that our children would be returned to us the following morning. On hearing the next morning from Mr. Swayne that he had quite an exciting affair in Clifton the Sister and myself rode over there and found out how matters stood and hoping to be allowed to have our children, but we arrived at the library and we were told that the meeting was to have been held that afternoon but was adjourned until eight o'clock in the evening.

Q. Meeting of whom?

A. Meeting of the people which was to be presided over by
136 Judge Little who was to be legally advised from New York. We felt sure if he would be legally advised from New York it would be to our interest as it was known——

Q. You say Judge Little?
A. Yes, sir.
Q. Who was Judge Little?
A. I know very little of him. All I know is he was to preside at the meeting that was to be held.
Q. Is he the Probate Judge of Graham County?
A. Yes, sir; I understood he was.
Q. What followed?
A. Having been assured that everything—feeling assured that everything would be settled in our favor a Sister and myself returned to the hotel at Morenci and were told that following evening when the meeting was over, they had arranged it on the phone to let us know how things had been settled, but as the hours ran on it was very late, at one quarter to twelve we went down to enquire of the clerk if there had been any word as to how the meeting had ended, whether in our favour or not; and we were told that Judge Little had decided that the children should remain where they were and that they feared that the children in Morenci would be removed from us.

The following morning, the morning of the 4th, Mr. Swayne knocked at our door and told us we would have to leave and that he was ordered to leave town.

137 Respondent objects to the answer and ask- that it be stricken out as immaterial.

The COURT: The purpose is for the witness to make a narrative but that of course is immaterial and not strictly incompetent, but the Court will disregard it. If it is insisted upon we will rule upon motion.

Mr. WALTER BENNITT: We do not care to press it.

A. (Witness continues:) We were informed we would have to leave there by two officers—I do not know the other officer's name—Mr. Dunagan was one—they said the children in Morenci would be removed from us by the authorities in Morenci at half past eight that morning. We told them we would not leave the children but where the children were we would remain with them.

Respondent objects to the conversation between the witness and a party not connected with this matter at all as purely hearsay.

The COURT: We would suggest to the Counsel that if they ask certain questions of the witness it may obviate some of this testimony.

Mr. IVES: This bears absolutely on the occurrence that resulted in the separation of these children from the New York Foundling Hospital.

The COURT: The statements of the witness may stand. If it is improper we will disregard it. We suggest that now perhaps you had better ask the witness some questions to direct her attention to
138 the matter you desire to bring out.

Q. On the morning of October 3rd. This was on Tuesday, I think that was October 3rd?
A. Yes, sir.
Q. What occurred in the rooms of the Morenci Hotel where yourself and the other sisters and those children were—at the rooms?

A. Well, do you mean, as I have been saying about the people who came in there and told us to leave?

Q. Yes, what occurred right there?

A. Why several men came in and said they had received authority from the people in Morenci to select three of the children that we had there——

Respondent objects to the answer as improper.

Mr. WALTER BENNITT: When the witness is testifying to what some man told her it becomes impossible for us to introduce testimony in denial of the statements because it is not pinned down to the time, place or person. We cannot possible introduce evidence to contradict the statement because the statement is indefinite. Certainly what somebody told her should be stricken from the record.

The COURT: We understand that the matter is put in the form of an objection?

Mr. BENNITT: Yes, sir.

Objection overruled by the Court.

The COURT: We cannot tell at this time whether this testimony is immaterial or not.

139 Respondent excepts to the ruling of the Court.

Q. What was the occurrence?

A. Those two officers and several other men stated that they had authority to remove three of our children and feeling that they had, as we had been told that morning that we must leave, we did not interfere, and they went through the rooms and selected—and there had been so many reports—there was a scar on one of the boys' neck, we showed them in order that they would not say that anything had been left on the children or that they had been injured by us as had been said to me in the rooms, and those gentlemen left with three children that morning, we having understood that our authority had ceased that morning over the children that we had at that time under our care.

Q. What boy was that that you say had a scar. Do you remember his name?

A. Edward Comisky.

Q. Now as to the people—I think you mentioned that your rooms were invaded or something of that nature? Who came in there and did they come by invitation and if not how did they come?

A. They seemed to have free access to our rooms; we had no privacy whatsoever until Mr. Mills had spoken to the authorities at the hotel.

Q. What Mr. Mills was that?

A. Of the mining camp at Morenci.

Q. What position does he hold?

140 A. He is Superintendent of the mining camp.

Q. After Mr. Mills came to your room what happened then?

A. Mr. Mills asked us how it was we had brought these children, and we told him we were perfectly ignorant of the homes and of the people and that we felt badly that any trouble had arisen and we

would be only too happy to have it rectified, and he told us that about the children in Clifton he could not advise us, but at Morenci we could leave with those we had when we were at leisure and we left on Wednesday morning, October 5th.

Q. And the children that were at Morenci, what became of those children?

A. Those all left Morenci with us, 21 of them.

Q. And the three that were with the officers?

A. We understood they went to homes over in Clifton.

Q. You have not seen them since?

A. No, sir; I have not seen them at all.

Q. Were the three children that you spoke of taken from your custody before Mr. Mills spoke to you of this matter or afterwards?

A. Before Mr. Mills spoke to us because he said that he had not given authority to any one.

Q. Did you go to Clifton, and on what day was it that you went to Clifton?

A. On Monday, the 3rd. We went over to look after our children thinking they were waiting for us to go over and look
141 after them.

Q. What occurred there between you and Mr. Gatti or the other citizens there who had these children?

A. We did not meet any people who had the children at all; neither did I see any of them. We were told we had no right to see them.

Respondent objects to the answer.

Q. Who told you?

A. Mr. Jeff Dunagan.

Q. How long did you remain in Clifton?

A. We were there only a short while, probably half an hour.

Q. What is the distance between Morenci and Clifton?

A. I am not much of a judge; I judge between six and eight miles.

Q. Is there a railroad between the two towns?

A. No, sir. We had to ride over in a wagon we hired.

Q. Did you see any of these children from the New York Foundling Hospital at Clifton?

A. No, sir.

Q. You only went there with the understanding, as I take it——

Q. Respondent objects to the question as leading.

A. We went over with the understanding that the children were there waiting for us to look after them; that they had been removed from the homes by Mr. Swayne and Father Mandin; but in-
142 stead of that the people had removed them themselves.

Q. What did Mr. Dunagan say about it?

A. He said Mr. Swayne had a very exciting experience?

Q. He was the constable I understand, the local constable?

A. I believe so.

Q. On the next morning after you returned from Morenci what happened at the Morenci Hotel?

A. He and one other officer who was with him told us that we must leave Morenci and leave the children behind us—I believe he understood that.

Q. What response, if any, did you make?

A. We told them where the children were we would remain we would not leave the children.

Q. Was that all?

A. Yes, sir; if it was necessary we would even risk our lives with them.

The COURT: What children do you refer to; the children you had with you at Morenci?

A. Yes, sir; those children we had in Morenci, in the hotel, your Honor.

Q. What is the circumstance attending the bringing of these children to Arizona—who are these children?

A. They are all foundling children who have been with us from infancy; they have been abandoned by their natural parents to us?

Our object in bringing them there was that Father Mandin
143 had found good homes, we understood, for them.

Q. How did you understand that?

A. Because Father had written to us to that effect.

Q. Who is Father Mandan?

A. He was the pastor of the church at Morenci and Clifton.

Q. How did you come to refer the matter to Father Mandan?

A. Our agent had written to him, as is his habit, in order to obtain homes for the children. He usually visits the homes before, but he didn't in this instance; we relied entirely on Father Mandan's word.

Q. Had any other children been distributed in Arizona?

A. No, sir.

Q. In New Mexico?

A. No, sir.

Q. Or along the border of the Mexican line?

A. No, sir.

Q. Do you know William Norton, the child in this particular case?

A. Yes, sir.

Q. Do you remember his history?

A. Yes, sir; he was abandoned to us as a young infant.

Q. Tell the Court when he was abandoned and what his age was and how you got hold of him, how the hospital got hold of him?

A. Might I refer to the books for his age, because I have
144 so many I can't remember.

Mr. WALTER BENNITT: We have no objection to the witness referring to the books.

A. (Witness referring to a book) William Norton was — September 14th, 1901, and surrendered entirely by his mother to the New York Foundling Hospital, being born outside of wedlock.

Q. Where was he born?

A. In the City of New York.

Q. At what place?

A. That we don't know.

By the COURT: Did you give the date he was received by the hospital?

A. I haven't got it; I think the lawyer has it.

Mr. T. D. BENNETT: We have it. I don't know that it's material except to identify the particular child in this case. I think it is October 1st, 1901.

Q. Did you hear on the morning of October 5th at Morenci?

Respondent objects to the question.

Q. (Continuing:) From these people of Morenci, from the officers and those gathered there, concerning William Norton or the children who were with William Norton.

Respondent objects to the form of the question.

Mr. WALTER BENNETT: The difficulty with the question is that it brings it down to nowhere; it makes it impossible to be met by contradictory testimony. It is not sufficiently definite as
145 to time, place or person.

The COURT: It did not have a bearing as to the reason, perhaps, why the Sisters left.

Mr. WALTER BENNITT: The reason why they left there is utterly immaterial, unless they show that some of these people who had these children were either engaged in intimidating them or forcing them to leave.

The COURT: Will it make any difference whether it was these people or other people?

Mr. WALTER BENNETT: We think it would. These people cannot certainly be responsible for what might have occurred between this witness and others in no way connected with the matter.

Objection overruled by the Court, and Respondent excepts to the ruling.

A. I think it was on the 4th, not the 5th because we left there on the 5th. Shall I answer what happened on the 4th?

Q. Yes, sir.

A. On the 4th we were told that the children in Clifton, were to remain where they were and that by order of Judge Little; and that the children in Morenci would be removed from us by the authorities in Morenci and placed in homes by them; and this of course we didn't wish to accede to at all; and also that the engineer had said that if we left with the children he would not run the engine out of that town.

Q. That was part of the word brought to you?

146 A. Yes, sir; that was brought to us by the officers; I don't know which one it is, but one of the two officers from Clifton who was with Mr. Swayne at the time — if we would leave Morenci with the children the engineer would not run the engine on that train.

Q. Were these officers the same officers who took the three children at Morenci?

A. Yes, sir.

Q. I understand you only know one of the officers, is that correct?
A. Yes, sir.
Q. By name?
A. Yes, sir; only one.
Q. When did you leave Morenci and depart from that vicinity?
A. On Wednesday, the 5th, on the seven o'clock train, to Lordburg.
Q. What time of day was that; seven o'clock in the morning?
A. Yes, sir.
Q. On the morning of Wednesday, October 5th, what, if any, conversation did you have with the officers or people of Clifton or Morenci?

Respondent objects to the question as too indefinite and does not state who the persons were. Objection sustained to the question in its present form.

Q. What occurred at the Morenci hotel on the morning of
147 October 5th, at the apartment that you and the children and the other Sisters occupied?
A. On the morning of October 5th there was not anybody in our rooms; we left there on Wednesday, October 5th, there wasn't anybody approached us at all. But when we reached our train several gentlemen were there who assured us they would see us off in safety. Mr. Charles Bull was one. He entered the train with us because we were so very fearful.
Q. What was the nature of the conversation with respect to its being an ordinary conversation or otherwise, on October 4th?
A. With whom?
Q. With the people that you discussed the children with.

Respondent objects to the conversation unless the witness can state who the conversation was with.

The Court: We think Counsel should endeavor to confine the question so as to show who the conversation was with.

Q. With whom was the conversation on October 4th?
A. When?
Q. At Morenci.
A. At what time.
Q. Well, did you have more than one conversation?
A. Oh, yes; our rooms were, I might say invaded by the people all that morning, until after Mr. Mills had waited on us; and they said we had no right to bring the children there and place them in Mexican homes.
148 Q. How many rooms did you have there?
A. Five rooms.
Q. How many people came into these rooms?
A. Oh, I would not be able to mention the number; there were so many, so much so that the officers had to order them out on Tuesday morning.
Q. Were the people there at your request or invitation?
A. No, sir; we asked them to leave our room, but they didn't seem to heed it at all.

Q. And this talk that you had with these people, was that an ordinary conversation or was it insulting, or otherwise?
A. Yes, sir; it was.

Respondent objects to the suggestion by Counsel.
The COURT: The witness is fully able to testify what took place herself.

Q. What was the nature of the conversation?
A. Well, that we were not all that we appeared——

Respondent objects to the answer.
Mr. WALTER BENNITT: The Court has announced the fact in this case that it will hear testimony in the interest of these children; that is for the purpose of determining what is the best interest of these children and what disposition the Court will make of them in the interest of the children.
The COURT: And that not alone.
Mr. WALTER BENNITT: That's one of the things. I under-
149 stand that this testimony is taken by the Court with a view to ascertaining the conditions surrounding these people who have them and the conditions surrounding the people with whom they were placed by the Sisters and the agent.
competency of these people who are seeking their custody now. What
Now it seems to me, not that I care anything about that testimony, but with a view to economizing time we say that these questions asked and this testimony does not throw but little light on the competency of these people who have these children to take care of them, or the competency of these people who are seeking their custody now. What someone else said would not affect these petitioners or the respondents; but as to the particular feature of the case now under discussion we think it is irrelevant and immaterial.
The COURT: We shall al-ow the witness to make a statement of what took place at the time; what bearing it may have upon the question we cannot determine at this time.

A. The people seem to think we were not Sisters of Charity at all.

Respondent objects to what the people think. That cannot be evidence.
The COURT: We will allow it to stand.
Respondent excepts to the ruling of the Court.

Q. Continue, Sister.
A. Well, many of the ladies and men who came into the room told us of the nature of the homes in which the children had been
150 placed and said we were doing them a very great injury; and some people said we were even slave dealers and we had sold our children; and I told them I thought they were very unreasonable women; that if we sold them, or if they thought we sold them for the sum the- said, $1.50 apiece, when we had expended $1500.00 to bring them there. But they treated us with scorn; so much so I cannot remember what they said because I was not looking for any redress for myself at all; it was only to have the little ones left to our care.

Q. Did you offer to take these children back to New York to the New York Foundling Hospital.

A. Certainly.

Q. What if any response did you have to that offer.

A. From whom?

Q. From any people at all at this time.

A. I didn't explain to any of the people who had the children; those were only the children we had with us that we had addressed ourselves to Mr. Mills and Mr. Rice, I believe, and told them we were very anxious to return with all the children. Those that were in Clifton he said he had no authority over them; that the people there would have to settle that; but the children in Morenci we could leave with.

Q. Did you have any conversation with the Clifton people concerning these children?

A. No, sir; because we didn't feel we were safe to go there.

151 Q. Why didn't you feel you were safe to go to Clifton?

A. Because Monday morning, October 3rd, we were told Mr. Swayne's life had been very much exposed the night before.

Respondent objects to what had been told to this witness about Mr. Swayne.

The COURT: The material point if the records can properly show is that in view of what she was told by Mr. Swayne or somebody else she had this state of mind. It is not material what the actual fact was that she was told about, but as a result of such conversation she may state if she was afraid to go as a result of such conversation or any information she received. That fact may be shown upon the records.

Q. Do I understand that the question in form is allowed?

The COURT: We understand the reason you were afraid to go to Clifton was something that had been told you.

A. Yes, sir; and we feared our lives would be exposed there.

Q. From whom did you hear this?

A. From the officers in whose charge Mr. Swayne and Father Mandin were—Mr. Jeff Dunagan.

Q. And thereupon what did you do?

A. We thought it more advisable for us to ride down to Morenci and remain until we had received word as to what the result of the meeting would be in the evening.

Q. After the meeting in the evening what did you do?

152 A. We enquired at the office if there had been any message for us, and we were told yes there was a message; that the children at Clifton were to remain as a result of the meeting presided over by Judge Little.

Q. When did you leave Morenci?

A. On Wednesday, October 4th, on the seven o'clock train in the morning.

Q. On the 4th or 5th.

A. On the 5th. Excuse me.

Q. I understand you to say you have been twenty-one years with this hospital.

A. Yes, sir.

Q. What is the nature of the work you do with the hospital.

Respondent objects to the question as irrelevant and immaterial.

The COURT:

Q. What is the purpose of it.

Mr. IVES: Simply to show the witness' relation to the petitioner.

The COURT: The witness testified that the general nature of her work was to look after these children in regard to putting them into homes.

Q. How many children do you attend in the course of one year.

Respondent objects to the question as immaterial.

Objection overruled by the Court and Respondent excepts
153 to the ruling.

Q. How many children do you look after or take care of in the course of the year.

A. We have usually under our charge about 1900.

Q. How many do you place out in the year.

A. On an average about 450 or 475 children in a year are placed in homes.

Q. For what length of time.

Respondent objects to the question as immaterial.

Mr. IVES: It goes to the purpose for which the children are to be returned.

(Objection overruled by the Court and Respondent excepts to the ruling.)

Q. For what length of time do you continue in your supervisions of these children after they are left at these homes.

A. Until the girls are 18 and the boys are 21 and if they need our interest and care at any time we are always only too willing and happy to do for them.

Q. Do you inspect the homes.

A. Yes, sir.

Q. Did you inspect the homes in Clifton.

A. We did not have a chance to.

Q. Why.

A. Because the children were removed before we had the opportunity to visit them, as we had arranged beforehand to do.

154 Q. Did you inspect the present homes.

A. No, sir.

Q. Why.

A. Because we were afraid.

Q. How did you happen to come to bring these children to Arizona.

Respondent objects to the question as irrelevant and immaterial.

The COURT: We do not entirely know the purpose of the counsel

in this question. It has been partially covered by the witness, however, if not entirely, stating the children were brought here for the purpose of securing homes in view of the invitation they had received.

Mr. IVES: This is only supplemental to what she has testified to.

(The objection overruled by the Court and Respondent excepts to the ruling.)

A. Our agent had written to Father Mandin making known we had children of the age to be placed in homes and Father Mandin had sent in the applications for the homes in Clifton and Morenci.

Q. And your instructions about these children?

A. That the homes were all good homes; that the people were all able and fit to look after the children and had no children of their own.

Q. From your hospital your instructions concerning the
155 disposition of these children.

A. Our instructions before leaving home were that we were to remain——

Respondent objects to the question as immaterial.

The COURT: It may have some effect on the question of the interest of the children. We will overrule the objection.

Respondents except to the ruling.

A. That they were to be placed in homes and the Sisters were to remain two or three weeks, or as long as was necessary, to visit each and every child, and if the homes were not all the Father had represented them to be the children were to be removed and returned to us.

Q. Did you or the people in New York have any information concerning the Mexican homes in Clifton outside the report of Father Mandin.

A. No, sir; we had no idea of what the Mexican people were. We knew nothing of their habits of life or anything concerning them.

Q. Had you placed any other children among homes of similar character.

A. No, sir; it was our first experience.

Q. After these children were placed there what if any offer did you make concerning the children that are now in question.

A. I do not quite understand the question.

Q. What if any offer concerning these children who are
156 now in question—Willie Norton—Did you offer to remove them and take them back to New York and look after them?

A. Yes, sir.

Q. I will ask you to look at the memorandum now shown you and state to the Court what it is at that particular place, (Counsel handing paper to the witness) William Norton.

A. William Norton.

Q. State to the Court what is the nature of the paper you are reading from.

A. These are the names and ages and histories of those children that we left in Clifton, or rather who are with the people in Clifton.

William Norton, born October 4th, surrendered October 4th, born in the hospital—that is in our hospital.

Q. What year was that.

A. 1901. He was surrendered by his mother at birth.

Q. Was the child put in the crib of the hospital.

A. Yes, sir; it is a formality that all children abandoned to us surrendered to the institution are placed in the crib.

Q. What do you mean by the crib.

By Mr. WALTER BENNITT:

Q. Are you testifying from your own knowledge with reference to the family history of these children.

A. Yes, sir; I know every one of them, have seen them all on the books. I have charge of these books and have written these especially in order to read them to the Court.

157 Q. But are you testifying from your own knowledge and recollection of the birth of this child and these children.

A. No, sir; I am testifying from the record.

Q. Only from the records.

A. Yes, sir; which is perfectly correct.

Q. Of your own knowledge you know nothing about it.

A. I have no knowledge; I know nothing only what our records show.

Mr. WALTER BENNITT: We ask that the evidence be stricken out as not proper to introduce the records.

By Mr. T. D. BENNETT:

Q. Do you remember William Norton.

A. Yes, sir.

Q. Personally.

A. Yes, sir.

Q. How long have you known him.

A. He has been in the house ever since he was born.

Q. Independent of that record how long, as long as you can remember, have you known William Norton.

A. I have known him, have seen him in our nurseries for about a year before he left the home. He had rather auburn hair, light, he was a bright child and it was I who picked him out for the home.

Mr. T. D. BENNETT: What is the objection to identifying
158 him in this way on record. It may be possible that there is a technical objection, but what good can it do to you, what purpose can it serve. Why not permit this to come in.

Mr. WALTER BENNITT: I object to it because it is not legal testimony.

By Mr. Chief Justice KENT:

Q. From what did you compile this document you have here?

A. From our records, where the records of all the children who are entered into the institution are kept.

Q. Who kept the records from which you took this.

A. One of the Sisters in the office who assisted me with the work.

Q. I understood you to say a minute ago that you kept the record.

A. Not the record of this book. The books are very numerous, I do not keep them all, but there is one sister who has charge of this record, and it was I who took this record history of William Norton from the records of the Foundling Asylum where the records of all the children are.

Mr. Chief Justice KENT: The majority of the Court think the evidence should be allowed to stand. (The motion to strike is denied.)

Respondent excepts to the ruling of the Court.

Mr. T. D. BENNETT:

Q. When was William Norton received in the hospital?

159 A. October 4, 1901.

Q. How old was he at that time from your records.

A. He was a new born infant. He was born in the hospital.

Q. What became of his mother.

A. I do not know anything about her. When she was well enough to leave the hospital she left and never has made any enquiry for the child.

Q. Have you the record of the other children.

A. Yes, sir.

Q. Where are the original records of the New York Foundling Asylum.

A. In the New York Foundling Asylum.

Q. Are they used much?

A. They are used all the time, that is why I could not bring them with us, but I can certify to this being as exactly as the records are, I can take an affidavit to it.

Q. Can you by examining your memorandum—you say you made that.

A. Yes, sir.

Q. Can you by examining that memorandum refresh your recollection so that you can tell the Court concerning each of the Clifton children who are involved in this proceeding or in these proceedings.

Respondent objects to the question as the witness has already testified she herself made this copy from the records, that she

160 knows nothing of the facts of this record of her own personal knowledge and it is not the way to prove the record.

Mr. IVES: It is I think a well established ruling that in the case of permanent records in daily use when that fact is esablished in a remote place testimony can be given by a person who has charge of those records and has made copies of them and will testify, refreshing his recollection, not necessarily to the fact, but with the same effect as if we had the records here. She cannot have personal knowledge of that fact but shows personal knowledge of the fact of the record because she testifies she made it herself. That is the only way in a case of this kind to prove it.

By Mr. Justice SLOAN:

Q. Are you the custodian of those records as Assistant Secretary.
A. Yes, sir; they are under my charge. I have the handling of them, but our books are so numerous I do not make all the entries because there are four other Sisters.
Q. Under the rules of your institution are you the recognized custodian of those books.
A. Yes, sir; I am.

By Mr. Chief Justice KENT:

Q. Did you yourself make this copy from the entries.
A. Yes, sir.
Q. Is it an exact copy of the entries.
161 A. Yes, sir.

(Objection overruled by the Court and Respondent excepts to the ruling.)
Mr. WALTER BENNITT: If the record is to be admitted we ask that the record itself be admitted and that is sufficient without the testimony of the witness.
Mr. Chief Justice KENT: There being no objection to the paper being offered instead of the witness testifying to it, it may be received in evidence.
(Paper filed as Plaintiff's Exhibit C.)

By Mr. Chief Justice KENT:

Q. We notice this first column in Exhibit C is a list of names of the people to whom the children were given. When was that put on the records.
A. We put those down fearing they might ask us for the names of the Mexican people to whom the children had been given. I put those in front to be an aid.
Q. When were they made in the books.
A. They never were in the books. The names of the family; only that part where it says the name of the child, the birth surrendered and the history is exactly from our records.
Q. So that this first column "To whom given" does not appear upon your books at all.
A. No, sir.
Q. Who are these people whose names appear in the first column.
162 A. Those are the Mexican families in Clifton for whom Father had applied for the children.

Mr. Chief Justice KENT: Then it will be understood this document "Exhibit C" that the first column of names under the heading "To whom given" is not taken from the records of the institution.
Mr. T. D. BENNETT: We understand, your Honors, that is not in evidence.

Cross examination.

By Mr. WALTER BENNETT:

Q. What is the name of the institution?
A. The New York Foundling Hospital.
Q. Are you assistant secretary?
A. Yes, sir.
Q. Who is the Secretary?
A. There isn't any Secretary now. Mother Ambrosia was the Secretary. Her office hasn't been filled. She died only about a month ago.
Q. You are now the acting Secretary, are you?
A. Yes, sir.
Q. And you say it is your duty to look out for homes for these children?
A. No; the agent obtains the homes. I usually go with him to place the children and visit their homes.

163 Q. Who has the charge then, and authority to place these children in homes?

A. The sisters who are sent by the Sister Superior from the hospital.
Q. And it is the Sister Superior, then, who has the charge of placing these children in homes?
A. She has authorized others to place them.
Q. She gives the authority?
A. Yes, sir.
Q. Who is now the Sister Superior?
A. Sister Teresa Vincent.
Q. Before any of these children were sent out, arrangements had been made for their reception in the homes of Mexicans in Clifton and Morenci, had it?
A. I don't quite understand.
Q. Before these children left the Asylum in New York, arrangements had been made for placing these children in homes in Clifton and Morenci?
A. Yes, sir.
Q. And each particular child was assigned to a particular person.
A. Yes, sir.
Q. When the children were sent out, each one of them was given a number, was it not?
A. Yes, sir; that was only for order's sake.

164 Q. Each child was sent out with a tag upon it, wasn't it? giving its number and the name of the person to whom it was to be delivered?

A. And its age, yes sir; because these children were too young to answer for themselves.
Q. These children were sent out, and sent to Morenci and Clifton upon the recommendation of the local priest at Clifton and Morenci?
A. Yes, sir.
Q. Then the Asylum trusted entirely to the recommendation of the priest in reference to what was proper homes to place these children in?

A. Yes, sir; because we thought he had lived with the people and knew them, and he told us he would be entirely responsible for them.

Q. Did you, before sending out the children, take occasion to ascertain how long the priest had resided in that neighborhood?

A. No sir; we did not ask that because we thought it was all right.

Q. You made no effort to ascertain what information the priest was in possession of with reference to these homes?

A. We accepted his word, as he had written us everything was all right, and our sisters went with the intention of seeing for themselves.

Q. But when they did get there, these children were delivered to these people?

165 A. Only for the time being until the homes would be visited.

Q. They were delivered to these people?

A. Yes sir.

Q. Were you present when these children were delivered?

A. Yes sir.

Q. Did you see the persons to whom they were delivered?

A. Yes sir.

Q. And you assented to their delivery, did you?

A. Not to all of them; but to those who received them. They were left on trial.

Q. But you assented to the delivery of those who were actually delivered in Clifton and Morenci, did you?

A. Yes sir.

Q. You saw the persons to whom they were delivered?

A. Yes sir.

Q. At or before their delivery did you make any investigation of the homes in which they were going?

A. We did not have an opportunity, as we arrived there late in the evening.

Q. And delivered them late that evening?

A. Yes sir.

Q. You delivered them to those people without any investigation further than the word of the priest, into these homes?

A. Yes sir; with the intention of visiting the homes later on.

166 Q. Then you left Clifton next morning?

A. Yes sir.

Q. Was there any consideration given or passed from the people who got the children to you or to anyone in charge of the children?

A. Not to me. What do you mean by that?

Q. I mean, was there any money paid?

A. I did not see any money.

Q. Did you know of any money being paid?

A. I did not know, only from hearsay.

Q. Did you know from hearsay?

A. Only from the people in Morenci who said it, American people.

Q. That is all you know?

A. Yes sir.

Q. If money was received, it was without your knowledge or consent?

A. Yes sir; without my knowledge.

Q. And without your consent?

A. Yes sir.

Q. If money was received by Mr. Swayne for any of these children, it was without your knowledge or consent?

A. Entirely so; Mr. Swayne did not receive any money.

Q. That would be contrary to your rules?

A. Yes sir.

167 Q. You say the priest, the local priest, in asking for these children, specially asked that light complexioned children might be sent?

A. Yes sir; he said there should be no negroes, or any Indians sent, or Chinese.

Q. But he said in his request, he asked for light complexioned children?

A. Yes sir, fair children; which led us to believe that the people were light.

Q. Did not this communication to your hospital with reference to light hair, lead the hospital to think the people with whom they were to be left, desired light complexioned children?

A. He simply said that the people wanted light complexioned children.

Q. What time in the evening was it that these children were delivered to the people in Clifton?

A. I cannot be exactly sure of the time we arrived there; I think the train is due at 6:40, and we were there only about fifteen minutes when we drove to the Father's house, and the Father had called the people in who had applied. Some of the people he brought in, we did not approve of at all.

Q. But you left the sixteen children there?

A. Yes sir.

Q. You were in Clifton how long that evening?

168 A. Until the following morning, I think about half past seven.

Q. Then you left and went to Morenci?

A. Yes sir.

Q. For the purpose of delivering the other children that were tagged for Morenci?

A. Yes sir.

Q. Before these children were started from New York, you had the names, you say, of the people to whom they were to be delivered?

A. Yes sir, Father had forwarded them to us.

Q. Did not those names suggest to you that they were Mexican people?

A. No, because they all sounded like Spanish names.

Q. Then the names did suggest to you that they were Spanish?

A. Yes sir, we asked Father that.

Q. Asked him if they were Spanish?

A. We asked him on our arrival if they were Spanish, and he assured us they were all American citizens, speaking both the English and Spanish languages.

Q. All of these children then, were light complexioned children, were they?

A. Most of them.

Q. Selected in accordance with the request of the padre?

A. Yes sir.

169 Q. How long had the hospital known this local priest, Father Mandin, was it?

A. Yes sir, Mandin.

Q. How long had the hospital known him?

A. Did not know him at all, only through his having written to us.

Q. Was he in any way connected with the hospital?

A. No sir.

Q. These children were sent out on his recommendation solely?

A. Yes sir.

Q. How long had the hospital been in correspondence with him?

A. I think there was something about a month, something of that time; I cannot just exactly say.

Q. Did the hospital authorities make any effort to ascertain anything about him and families where they were sending these children to, other than the correspondence with the priest?

A. No.

Q. When did you first learn that there was any trouble with reference to the children who had been left in Clifton?

A. October second, Sunday afternoon after the children had been placed in the homes in Morenci.

Q. On what day was it they were placed in the homes in Clifton?

170 A. October 1.

Q. The first you heard was October 2?

A. Yes sir.

Q. Who first told you of any difficulty or trouble?

A. One of the officers who had been sent up from the other place.

Q. Can you state who it was?

A. Mr. Jeff Dunagan was the one who spoke to me.

Q. What did he state to you?

A. He stated we had placed American children in Mexican homes, which the American people would not allow. They were very much displeased and rather excited over it, and unless we removed them, the people would remove them themselves. We told them that we were only too willing and happy to rectify an error if we had made one.

Q. Who told him that?

A. I don't know.

Q. Did you tell him yourself that you were ready to remove them?

A. Yes sir; I told him the agent would go out at once and remove them.

Q. Who was the agent, Mr. Swayne?

A. Mr. George Whitting Swayne.

Q. Did he go out when the children were removed?
A. He was there with us.
Q. Did he come with you from Morenci?
171 A. Yes sir.
Q. Was Mr. Swayne present when Mr. Dunagan said the American people would not permit these children to be left with the Mexicans?
A. Not when he spoke to me, but shortly afterward.
Q. Do you know anything about what reply Mr. Swayne had made to Mr. Dunagan?
A. No sir; as soon as Mr. Swayne made his appearance, I told him to go out at once and remove all the children, and he said he would do it.

Mr. T. D. BENNETT: I think it would probably be better for us to suspend until Judge Sloan returns.
Chief Justice KENT: You will allow the court to judge of that.
Mr. T. D. BENNETT: Certainly; we merely suggested the matter.

By Mr. WALTER BENNETT:

Q. Did you know Mr. Swayne positively refused to remove the children from the Mexican families? and told Mr. Dunagan it was none of his business?
A. I didn't. I don't think Mr. Swayne would say so.
Q. You didn't hear him say so?
A. No sir.
Q. Did he not say in your presence that the children had
172 been placed there by the Asylum authorities, and they were going to remain there?
A. No sir; he did not.
Q. Not in your presence?
A. No sir.
Q. Did I understand you to say upon direct examination, someone told you that the children at Clifton would be returned in the morning?
A. Yes sir.
Q. Who told you that?
A. Mr. Jeff Dunagan.
Q. He told you the children would be returned where, to Morenci?
A. Yes sir; he said he would see to that.
Q. Who was it told you you would have to leave Morenci?
A. On the morning of the fourth?
Q. Any morning—yes if that was the morning.
A. Mr. Jeff Dunagan and one other officer; I do not know the name of the other gentleman.
Q. They told you you would have to leave?
A. Yes sir.
Q. What did they tell you would happen to you if you did not leave?
A. I don't think they really said anything.

Q. Why? Did they say—did they tell you why you would have to leave?

173 A. Yes sir; they said we would be obliged to leave because Mr. Swayne must leave, and that we could not have the children who were in Morenci; we were to forfeit all claim to them after half past eight that morning, the fourth.

Q. Did he tell you you must leave on account of any force?

A. No but when he told Mr. Swayne to leave because he would not be responsible for him any longer——

Q. Did he tell Mr. Swayne—in other words, did he threaten Mr. Swayne unless he did leave?

A. I did not hear him threaten him, but I think he feared probably it was more advisable for him to leave for his own safety.

Q. Who feared?

A. I think the officer; that it was advisable for Mr. Swayne to leave.

Q. What makes you think that?

A. I intimated that.

Q. He intimated that?

A. I intimated it myself.

Q. That is the reason you think it is true?

A. That's all.

Q. Now is it not true that three of these children were voluntarily delivered by you or those with you, to Mr. Dunagan for the purpose of finding homes for them?

A. No sir, they were not voluntarily delivered at all.

174 I was impressed that this gentleman had the authority from the Morenci people who were to remove all the children at half past eight, and they were, on account of kindness to Mr. Swayne during his stay in Clifton, they were allowed to make choice of three children. That was my understanding; in fact, I did not enter into it very much because I thought we had no further authority over the children.

Q. I don't quite understand what you mean when you say they were allowed to select three of the children. Who allowed them?

A. That is more than I can answer. Probably those men can answer that. They told us the authorities in Morenci had given them authority.

Q. Where were these children?

A. In the rooms. We had five rooms, some in one room, and some in another.

Q. These children were in those rooms?

A. They were in our rooms, yes sir.

Q. Do you mean to be understood that Mr. Dunagan and someone with him took these three children without your consent?

A. They selected them—they did not have their clothing on at the time; it was early in the morning, and I advised to have them dressed, but did not place my hands on them, but asked him if he would let me have the names of the people who had the children.

175 Q. Were these children taken by Mr. Dunagan with your consent?

A. No sir.
Q. Were they taken in spite of your protest?
A. I didn't say anything.
Q. The children were with you in your rooms?
A. Yes sir.
Q. And Mr. Dunagan took three of them?
A. No, he took two of them, and I think one other man took one.
Q. They were taken without your consent?
A. Yes sir.
Q. Were they taken against your protest?
A. I didn't say anything at all, because I didn't think I had any authority to.
Q. You knew he was going to take them?
A. Not until he told me.
Q. He told you he was going to take these children?
A. He told me he had the authority from the Morenci authorities there.
Q. To take three children?
A. Yes sir.
Q. Now you say you refused to give some of the children to those whom they were tagged, some of the Mexicans? Why did you refuse?
176 A. Because I did not feel impressed with the appearance of those, the first three people the Father called in.
Q. Were they the first three he called in?
A. Yes sir.
Q. You refused to give them the children?
A. Yes sir.
Q. Were you impressed with the appearance of the rest?
A. Not so, only I did not like to over-ride what Father had said, and thought I would give him an opportunity of placing them, as he said the homes were all right; and then would satisfy myself by visiting them or having the other sisters visit them.
Q. Then you still had objections?
A. Yes sir I had.
Q. To all of them?
A. Yes sir.
Q. But you let them go?
A. With that understanding; for I did not want to feel I knew more than the priest did.
Q. What did you state to him? Had you told the priest you objected to these people?
A. Those three people I told him; and I told him, in fact, I was not impressed with the people; they were not the people I had expected our children for.
Q. You told him that as to all the people?
A. Yes sir.
177 Q. Then you were not satisfied with these people?
A. No sir.
Q. But you delivered the children to them?
A. Yes sir; with the understanding we were to visit them.

Q. What was it—I did not understand exactly what you said in direct examination in reference to the scar on Edward Cominsky, was it——

A. That afternoon when the mob had formed in the hotel at Morenci——

Mr. WALTER BENNETT: I ask to have the term "the mob" stricken out.

The COURT: Yes, that will be stricken out. He is simply asking about the scar.

Q. I want to know what it was you said about the scar? I did not fully understand.

A. My object in showing that was because we were accused of having a number of children sick, and who had died with us, and having left them on the road, and I thought I would show them that scar. I think it was a scar from an abscess the child had when he was young.

Q. You had been accused by whom?

A. By the people at the hotel, they said we had lost our children along the road.

Q. You cannot state who it was?

178 A. No sir; there was such a number of people there, I could not say.

Q. You simply pointed out the scar on this Edward Cominsky for the purpose of identification, so it might be known the scar was there when you delivered it?

A. Yes sir; to let him know we knew the child had it.

Q. That was one of the children that was taken away by Mr. Dunagan and one other man?

A. Yes sir.

Q. Did you say your rooms at Morenci were invaded?

A. Yes sir.

Q. Did any people come in your rooms by force or violence?

A. Well, they opened the doors and walked in; they had no leave whatsoever; when we had our doors locked, they knocked on the doors, so it was absolutely necessary to open them.

Q. Do you know anyone who entered those rooms without invitation?

A. I know them by sight, but don't know their names.

Q. Do you know whether any of the people who now have any of these children were there?

A. I don't know.

Q. Were they men or women?

A. Both men and women; there were more women than men.

Q. They invaded your rooms—opened the door against your consent?

179 A. Yes sir.

A. And came into your rooms?

A. Yes sir, until Mr. Mills had given word on Tuesday morning that we were not to be annoyed by the people any longer.

Q. After that, you were not annoyed?

A. No sir.

Q. Did any of the white American people in Clifton request that these children be placed with them?

A. Not that I know of. There was no American person spoke to us from the time we entered Clifton until we left there.

Q. Did they at Morenci?

A. Not that I know of; no one spoke to me.

Q. You have no knowledge of white people applying for the care and custody of these children?

A. No sir; I don't know of any.

Q. You have no such knowledge?

A. No sir, I have no knowledge of it.

Q. I understood you to testify upon direct examination that Mr. Mills told you you could leave with the children, except three.

A. Oh no, he didn't say that; he said we might leave with all the children we had when we wished.

Q. He did not require you to leave three?

A. Oh no.

Q. Those three children had been taken, as you say, before
180 Mr. Mills came?

A. Yes sir; before Mr. Mills visited us.

Q. Did you request Mr. Mills to secure the restoration of those three children to you?

A. No sir I didn't because Mr. Mills gave us to understand he had no authority in Clifton.

Q. But these three children were taken at Morenci?

A. Yes sir, but they were not there when we had seen Mr. Mills, there had left there some time.

Q. How do you know they were not there?

A. I don't know; only I understood they were not.

Q. During any time you were either at Clifton or Morenci, was any violence offered to you.

A. No there was no violence offered to us.

Q. Was there any threat of violence made in your presence?

A. As to ourselves?

Q. Yes.

A. No sir.

Q. You heard no threats of violence?

A. Not relative to us. I heard a threat of violence offered to Mr. Swayne the evening he left the hotel to go there to remove those children on that Sunday night; but Mr. Swayne did not hear that—I heard it.

Q. So far as you were concerned, no threats of violence were made?

181 A. I didn't hear any.

Q. Or to the sisters who were with you?

A. No sir; I didn't hear any.

Q. I want to ask you this once more, with reference to those three children; did I understand you permitted those children to go, through any fear of force or violence?

A. I felt I had no authority any longer over them, and that those men had received the authority from the people of Morenci to act,

because I did not think officers of the law would presume to violate it.

Q. Did they, or anyone else, tell you that these men had authority to take these children?

A. Only themselves.

Q. Did they themselves say they had authority?

A. Yes sir.

Q. Did Mr. Dunagan say he had authority to take those children?

A. Yes sir.

Q. And that he was going to take three children?

A. Yes sir. He was not abusive about it at all; he simply said he had received authority to select two children.

Q. Who did he say he had received the authority from?

A. I understood him to say he had received it from the authorities at Morenci.

Q. This is the reason you tacitly consented to their being taken?

182 A. Yes sir; because I felt I had no authority over them.

Q. You testified the engineer said he would not run the *engine* if the children were taken?

A. The officer told us that the engineer had said he wouldn't run the engine of that train on which we left with the children.

Q. What officer was that?

A. Mr. Jeff Dunagan.

Q. Mr. Jeff Dunagan said the engineer said he would not run the train if the children were on it?

A. Yes sir.

Q. You say Mr. Charles Bull escorted you to the train, or at least assured you of your safety, and that you would have no difficulty in leaving?

A. Yes sir; when we were leaving Morenci; and he rode some little ways, to a place where we had to transfer, with some other gentleman—I don't know the other gentleman's name—a part of the way to where we had to transfer to another road. I think it was just a few miles down, maybe eight or nine miles. It was the train that runs out from Morenci.

Q. The purpose of your hospital is to find homes for the homeless children?

A. Yes sir.

Q. Was that the purpose for which they were sent to Arizona?

A. Yes sir.

Petitioner objects to the question, as the record is the best
183 evidence, and the purposes set out in the Articles of Incorporation are the proper means by which to prove it.

The COURT: We will allow the question.

Q. That is the only purpose, then, of the hospital, to find these children good homes?

A. Well, the purpose is to receive young infants, and having received them, when they reach the age to be placed in homes we prefer to put them out when they are young, so that they will grow up in the love and affection of the people with whom they are placed.

Q. The purpose and object is to place these children in proper homes, where they will have good care, attention and education, and have good homes?

A. Yes sir.

Q. That is the only purpose of the hospital?

A. That is the only purpose.

Q. If the people with whom they are now, furnish them good homes, what objection has the Asylum to their remaining in the homes of the people with whom they are now?

Petitioner objects to the question as immaterial. (Objection argued to the court by counsel. Objection over-ruled by the Court and petitioner *accepts* to ruling.)

A. I don't feel at liberty to answer that until our rights have been rectified, and we have been allowed full charge of the children. I have no authority to answer.

184 Q. Then it is the purpose of the hospital to establish their rights in this proceeding, is it, rather than to find good homes for the children?

A. Yes sir.

Petitioner objects to the last three words of the question, that were in a low voice "Rather than provide good homes for the children," and objects to the question in its present form. Objection over-ruled by the Court, and petitioner *accepts* — the ruling.

A. Yes sir, because those children were removed from us without our will, and I do not feel I have any authority to answer anything further than that, the children be restored to us.

Q. (Counsel handing paper to witness.) Will you please look at the paper now shown you, and state if that paper, or a similar one, was attached to the clothing of each one of the children that were brought to Arizona, about which you have been testifying?

A. Yes sir; those are always sewed on the clothing of the children.

Mr. WALTER BENNETT: We will offer this paper in evidence.

(Paper filed without objection as defendant's Exhibit No. 1.)

Q. Will you look also at the paper now shown you, and state if that paper, or a copy of it, is also attached to the clothing of each child sent out? (Counsel handing another paper to the witness.)

185 A. Yes sir.

Mr. WALTER BENNETT: We will offer this paper in evidence also.

(Paper filed without objection, as defendant's Exhibit No. 2.)

Q. Were you present at Morenci when the children were delivered?

A. Yes sir.

Q. You were present during the whole of the time?

A. Yes sir.

Q. Was Mr. Bull present?

A. I didn't see him. I don't recollect seeing Mr. Bull until the morning of October third.

Q. That was after all the children were delivered?

A. October fourth rather.
Q. That was after all the children were delivered?
A. Yes sir.
Q. Where were the children delivered in Morenci?
A. From the house I believe the priest occupies when he is there.
Q. The priest's house?
A. Yes sir, I think so.

By Mr. Justice SLOAN:

Q. Were the children put into the custody of anyone in Morenci while you were there?

A. Each of the families for whom the children were, were
186 there, and received each child.

Q. In Morenci, that is?
A. Yes sir.

By Chief Justice KENT:

Q. Then you took them back again?
A. Yes sir, we took them all back.
Q. This paper that has been introduced, Exhibit 2, did I understand you that paper was actually on one of those children or a paper similar to that?
A. A paper similar; that very likely was on a child too, because we sent that to have the right name of the people and the post office address and everything correct for our record.
Q. This is to be returned to you by them?
A. Yes sir.
Q. They are to fill it out, the foster parents, and return it to you?
A. Yes sir.

By Mr. WALTER BENNETT:

Q. You were present as I understand during all the time the children were being delivered at Morenci?
A. Yes sir.
Q. Are you prepared to say Mr. Bull was not present at all during that time?

A. He was not in the house at all; no sir; only the agent and Father Mandin and one other man who seemed to assist
187 Father Mandin, whether he was the sexton of the church I don't know, and the other sisters who were with us.

Q. There was no one else present?
A. No sir, no one else was in the house.

Mr. TOM BENNETT: Where was this, at Clifton or Morenci?
Mr. WALTER BENNETT: At Morenci.

A. No, Mr. Bull was not in the priest's house.
Q. We understand, then, that there was present, yourself, the priest, the people to whom the children were to be delivered and the children, anyone else?
A. There was the priest, Mr. Swayne, the two other sisters, four nurses and myself; the people for whom the children were, were

only admitted one at a time and left the room. Everything was very orderly. There was no one else outside of our own party there in the priest's house.

Q. We are speaking now of Morenci?

A. Yes sir; there was nobody else in there.

Q. Those people were only admitted one at a time at the priest's house?

A. Yes sir; and the Father mentioned what the history was; that they had not any children, and they were very good people, etc.

Q. How many rooms are there in the priest's house at
188 Morenci?

A. There are only two rooms.

Q. In which room were you?

A. I was in the outer room, which I judge was the sitting room; the other room was a bed-room.

Q. In which room were the children?

A. In the bedroom. The rooms are about of equal size. They are two pretty good sized rooms.

Q. You were not in the room with the children?

A. No sir, I was sitting out side in the room where Father was.

Q. What was going on in the other room you did not see?

A. Oh yes, I was sitting outside the door.

Q. Could you see all over both rooms?

A. Yes sir, because the little ones were sitting right around so we could see them.

Q. Did I understand you to state positively that Mr. Bull was not in the house, in neither one of these rooms?

A. Yes sir, he was not in the house.

Q. Was there any money paid by anyone of the people who got the children at that time to the priest, Mr. Swayne, or anyone having charge of the children?

A. I did see some money handed to the man who was the sexton there—I don't know what he was, but he seemed to be father's assistant, but I didn't know what it meant.

189 Q. Did you see some money handed to the sexton?

A. Yes sir—it was a small amount; I thought it was something they wanted to donate to the church. I never conceived it was donated to us at all.

Q. Do you know what became of that money?

A. No sir. In fact, it didn't impress me at all. I heard the people say we had sold the little ones.

Q. By whom was this money given to the person who was assisting the priest?

A. By whom was the money given?

Q. Yes.

A. I think the people who received the children, as far as I could understand; but it was only silver, and I thought it was some offering they were making to the Father for his church.

Q. How many such offers did you see?

A. I really couldn't say, because it didn't make any impression on me.

Q. Did you see more than one person pay money to the priest or his assistant?
A. Yes sir, I think there was more than one, but that I can't say, as I didn't pay any attention.
Q. These people who paid the money got the children, didn't they?
A. Yes sir.

190 Recess taken at 3:40 P. M. of five minutes.

3:45 P. M. Court re-convened.

By Mr. WALTER BENNETT:

Q. Have you ever made a demand that these children be returned to you or your hospital?
A. We have through our lawyers.
Q. Do you yourself know anything about making any demand?
A. I don't quite understand.
Q. Have you yourself made any demand for the return of these children?
A. Yes sir, we are making it now.
Q. Have you yourself ever demanded of the people who now have these children, that the children be returned to you?
A. No, we have never seen them since we left them.
Q. You have never made any demand for the children?
A. No, because we were told that they were to remain where they were.
Q. Have you ever visited the homes of these people who now have the children?
A. No sir.
Q. Do you know anything about whether the children are now in good homes or not?
A. No sir, only from our lawyers having told us.

By Mr. T. D. BENNETT: Did the hospital receive any
191 money from any of these people to whom the children were sent?

A. No sir, not one penny.
Q. Were you authorized to receive any money?
A. No sir.
Q. For the children?
A. No sir.
Q. Have you any knowledge of any money being received—by the hospital, I mean.
A. I know the hospital has not received any money at all.
Q. When those officers were in the rooms at Morenci, how were they attired?
A. I think that they had shirt waists on, and each had a rifle.
Q. What do you mean by a rifle?
A. He had a pistol of some kind.
Q. Where were those pistols carried?
A. They wore them in front, in the belt.

Q. Did you see them draw those pistols there from the belt?
A. No sir, I didn't.
Q. At the time they stated to you that they had authority to take those three children, did they at that time have those pistols on?
A. Yes sir, at all times when I met those officers.

By Mr. WALTER BENNETT:

Q. Was there any demonstration made with the pistols you speak of?
192 A. I didn't see any.
Q. They were simply in their holsters, the pistols?
A. Yes sir.
Q. Are you the treasurer of the hospital.
A. No sir, I am the assistant secretary.
Q. You don't have charge of the money as assistant secretary?
A. Yes sir, I have charge of the handling of the moneys, yes sir, and the paying out of the bills, etc. for the house.
Q. How do you pay the money out?
A. How do you mean?
Q. I mean to say, who has charge of the money, how do you get the money if you are not the treasurer?
A. That is a part of my work that has been allotted to me, is to meet the bills for the expenses of the house. The bills are paid, small bills paid in cash, and large amounts by checks.
Q. Do you pay by check?
A. Yes sir, but my name is not signed to the check; I only fill them out.
Q. Who pays the checks, where is the money kept, who has charge of the money?
A. I have charge of the money, it is kept in the safe in the office.
Q. As assistant secretary, you have charge of the money?
A. Yes sir.
193 Q. To whom is the money of the hospital paid—to you?
A. No sir, it is paid to the sister superior, who is also the treasurer.
Q. Then she really has charge of the money, but you pay it out as assistant treasurer?
A. Yes sir.

Witness excused.

L. J. DUNAGAN, called as a witness, on behalf of the petitioner and duly sworn, testified as follows:

Examined by Mr. IVES:

Q. Where do you reside?
A. Clifton, Arizona.
Q. What is your occupation?
A. I have two different kinds; do you want them both?
A. I want your official position?
A. I am deputy sheriff.
Q. Were you deputy sheriff in October, 1904?

A. Yes, sir.
Q. In what county?
A. Graham.
Q. Now, will you please tell what occurred at Clifton that you know of with respect to these infant children that were distributed there?

Respondent objects to the question.

194 Mr. WALTER BENNETT: We think counsel should proceed by question and answer in this case, at least. We haven't objected to the sister telling the story, but we think that this witness's examination should come by question and answer.

The COURT: It may be more desirable, perhaps, to have it by specific question and answer.

Q. Were you in Clifton on the first of October, 1904?
A. Yes, sir.
Q. Do you remember whether or not a train arrived with children upon it?
A. I didn't see it arrive; I wasn't at the depot, but the children came.
Q. When did you first see them?
A. On Sunday evening in Morenci. I went to Morenci.
Q. Why did you go to Morenci?
A. I was called on on Sunday evening about one o'clock by five citizens of the town, to go to Morenci and arrest Mr. Swayne and the father, the priest.
Q. What, Mr. Swayne and what father?
A. The agent Swayne and I don't remember the priest's name.
Q. Father Mandin, was it?
A. I think so.
Q. Now, what did these people say to you—who asked you to go there and arrest them—who were the people, first?

A. To the best of my knowledge, I think there was five
195 of them—Tom Simpson, Mike Riordon, Sam Abram, Jake Abram, Harry Wright.

Q. What did they say to you?
A. They asked me to go and arrest these people.
Q. For what reason—did they give any reason?
A. Well, yes.
Q. Tell me just as fully as you can all that they said?
A. They asked me to go and arrest these people and bring them to Clifton. I told them I couldn't arrest the people without a warrant; however, I would go up and bring the people down, if they wanted them to come down to get the fact of what they had done.
Q. What did they say about that, to get the fact of what they had done? Explain a little more fully what was said by them and by you?
A. They stated the case, that these children had been distributed amongst the Mexican families, and told me the different names of the people. I was acquainted with them; I knew where they lived, and they wanted them to come down and make a statement. They wanted to know what he meant.

Q. Then did you go to Morenci?
A. Yes, sir.
Q. When?
A. On Sunday evening between one and two o'clock.
Q. What time did you get to Morenci?
196 A. About two or 2:30.
Q. What did you do?
A. I went in there to see Mr. Swayne and couldn't find him at the time I went in. I met the sister, though, who just testified.
Q. Was this Sunday, the 2nd?
A. Yes, sir; I think so. It was Sunday evening.
Q. Tell what you said to the sister, if anything?
A. I went to the sister and asked her where the agent was, Mr. Swayne; she said he was in the hotel some place, she didn't know exactly where; but thought he was taking a bath or something. They assisted me in hunting for him, but we didn't find him until later on.
Q. Later on did you find him?
A. I went down to see Mr. Mills, the superintendent of the Detroit Copper Company. He was sitting near down to the hotel, and he called me over and I explained to him my business; that we had come up to investigate the matter to see what their intention- were; what he intended to do. He says, "I have been waiting for some of the authorities to take hold of this. I don't know what to do, and there is no officers here." He says, "I will go with you and we will go up to the hotel and see Mr. Swayne and see what he means by his actions."
Q. Who was the other person that went with you?
A. Mr. Tom Simpson.
Q. You and Mr. Simpson and Mr. Mills?
197 A. Yes, sir.
Q. Did you find Mr. Swayne?
A. Yes, sir.
Q. Where was he?
A. I found him in his room in the hotel.
Q. What conversation ensued then?
A. We all had a cut at that. I can tell it about, though. I think Mr. Mills was the first man that talked to him, the superintendent; he asked him if he realized what he was doing; he said he really did. He asked him if he was familiar with the people he left these children with. He says, "I am not; I am here under the advice of the father and we will have to be governed by his advice."
Q. Was the sister present at this conversation?
A. No, sir; this was private, with Mr. Swayne, myself and Mr. Swayne and Mr. Hills.
Q. Did Mr. Swayne ever say anything to you about their ever taking the children back later on, if they were not satisfied?
A. He did after about 12 hours.
Q. Tell the rest of what happened at the first conversation?
A. We talked to him, I think, something like an hour, possibly longer, and tried to get him to give some *some* agreement, and to try

to make him understand the people he had placed the children with; and he said the children was placed and they would stay placed until further advice from the institution. That these chil-
198 dren came from this institution assigned to these people, that they had them in possession; and the question was asked by Mr. Simpson if he could not make the assignment of these children to white people. He says, "I won't answer the question."

Q. What happened then?

A. As I said before, we kept talking to him and could't come to any understanding, until finally after we come out of the room—the hotel was all full of people, and they demanded the children gathered up and brought to the hotel. They objected to me taking him back to Clifton until the children was all returned to the hotel from Morenci; which he did. He returned all the children to the hotel.

Q. Who returned the children to the hotel?

A. Mr. Swayne and the priest; and they had some one with them; I don't know who they had.

Q. When was it that the return of all the children to the hotel was effected?

A. I think they got them in about 10 or 11 o'clock; may be later.

Q. In the night?

A. Yes, sir; it was raining some.

Q. Did you then go with Mr. Swayne to Clifton that same night?

A. Yes, sir.

Q. Before you went with Mr. Swayne to Clifton, did you
199 have a conversation with any sisters?

A. Yes, sir; I had with the sister who just testified; I talked to her.

Q. Did you have any conversation with that sister with respect to whether these children were to be placed in these homes permanently or were to be taken back if not satisfactory?

A. No, sir; not at that time. I did afterwards.

Q. What occurred at that conversation afterwards?

A. At the conversation at that time at Morenci?

Q. Yes, sir.

A. She made about the same statement as Agent Swayne did; that these children was placed there under the recommendation of the father, and they did not propose to be dictated to; that they thoroughly understood their business and had been in it for 20 years, or something to that amount.

Q. Nothing was said at that time with reference to any mistake?

A. No, sir.

Q. You went to Clifton with Mr. Swayne?

A. Yes, sir.

Q. What happened at Clifton—did the priest go with you two?

A. Yes sir.

Q. Tell me what happened—where did you arrive at Clifton?

A. We arrived at the Clifton hotel; and they notified us that there was a meeting being held that had been waiting for us at the
200 library, and we went to the library.

Q. You and Swayne and the priest went?

A. Yes, sir.
Q. About how many people were in the hall?
A. I judge 350 or 400 people.
Q. The hall was crowded?
A. Yes, sir.
Q. What occurred then?
A. There wasn't anything; it was in such a tear-up and tangle there wasn't anything said. I know he attempted to make a statement but there was so much fuss he couldn't be heard at the time. That night there wasn't anything decided on—Sunday night at Clifton there was nothing decided on that night.
Q. Did you at any time hear any threats made to injure him?
A. Well, it was general talk, different ones said "tar and feather him," or something like that.
Q. Did any of them say "hang him?"
A. Not that I remember of.
Q. Didn't you hear the word "hang" used?
A. Not at that time; no sir; not right then.
Q. How long did that meeting last?
A. About—oh, I guess 30 minutes or between that and an hour.
Q. Then what did you do?
A. I taken Mr. Swayne and the priest to supper and taken
201 them back across the river from the hotel side, and we went to bed—they did; I sat up.
Q. When did the sister come over to Clifton?
A. On Monday—that was on the third.
Q. You arrived at Clifton with the priest early Monday morning in the night time?
A. Yes, sir; they came down about noon. They might have come earlier, but it was stated in the first meeting on Sunday night that there would be another meeting on Monday morning.
Q. Did you at any time have to do anything to protect Mr. Swayne?
A. Nothing more than talk; talked to the people and reasoned with them.
Q. State just as fully as you can what occurred?
A. I can hardly state because I don't thoroughly understand right where you are, because I had two nights experience with this, and it is a good deal to remember.
Q. State in detail just as the events occurred, what occurred?
A. Well, on our return from Morenci we didn't come to any understanding at all; there was nothing done the first meeting, and I got up and announced we would have another meeting at nine o'clock the next morning. Well, at nine o'clock I received a message from Solomonville from Judge Little.
Q. Who is he? Judge of what?
202 A. Probate Judge.
Q. Go on.
A. To postpone the meeting until that night until he arrived; that he could possibly give some legal advice; and we did so. After the arrival of Mr. Little——

Q. Did anything occur between the adjournment of the meeting and his arrival?

A. No sir.

Q. Well, go on?

A. On his arrival we had a private meeting—I guess 30 or 40 men, in the drug-store. They all talked and advised him, and finally they come to a conclusion, he and Judge Little, that he allow Judge Little the privilege of making a statement to the people that he would leave the children where they were placed.

Mr. McFARLAND: Who is "he" that you speak of?

A. Mr. Swayne allowed him the privilege to make the statement to the people that he would leave the children where they were placed, and they would be advised by the institution.

By Mr. IVES:

Q. What occurred after that?

A. There was so much talk, I don't know as I could state exactly what was said.

Q. Up to this time had there been any threats to Mr. Swayne, any further threats?

A. They advised him to get out of the town.

203 Q. At this meeting in the drug store at which he was present when they advised him to leave the children with the people where they were placed, did they say anything with respect to what might happen to him if he didn't?

A. They said he was taking considerable chances; that they didn't think he could take the children out of the town; that the people had become so enthused over it that they didn't think it advisable for him to attempt to take the children out of the town.

Q. Subsequent to this private meeting was here another public meeting had?

A. No, sir.

Q. Now what occurred after that?

A. After this meeting?

Q. Yes, at the drug store; what did you do after that?

A. We took him, Mr. Swayne, the priest, and I guess 12 or 14 of us went to a room and stayed there a couple of hours; and we got in a hack, six of us including Mr. Swayne and the priest, and carried them back to Morenci.

Q. Previous to carrying them back to Morenci, did you hear the word "hanging" used at all? You told me before you didn't hear it at that conversation?

A. No, sir; I left that out. In that last meeting I might have heard that hollered, or something; there was quite a hurrah or jangle going on.

Q. Do you mean hurrah in the meeting at the drug store

204 or the people outside?

A. No the people outside.

Q. They were shouting "Hang him?"

A. No, they didn't shout it. I guess I heard it as much as once.

Q. When you went back to Morenci, what did you do?

A. We was met at the hotel, in front of the hotel by Mr. Hobbs, the deputy sheriff. He told us what the people had decided to do.

Q. What was that?

A. That they had decided to keep the children there—this was in Morenci; that they had decided to keep the children. So we went into the hotel and the sisters were asleep, I suppose; they were in the rooms; they weren't disturbed at that hour, but just before his leaving he went and knocked on the door and called them up and told them what had been done, what agreement had been made.

Q. That is Hobbs told them?

A. No, Mr. Swayne told the sisters what had been agreed on; that he was going to leave, thought it advisable, and that he was going to leave.

Q. Did he say that he thought—when he said he thought it was advisable, did he state anything that indicated he was in apprehension of bodily harm?

A. He said all the time he never was in any danger.

205 Q. What did you tell him?

A. I told him I thought he was.

Q. Did he tell the sisters you had told him?

A. Yes, he stated to the sisters I told him—well, he just stated to the sisters he had orders to go out on the first train, and that he would go.

Q. Now about the priest, how about him?

A. The priest went too.

Q. He had similar orders?

A. Yes, he had similar orders.

Q. Did he say from whom he had gotten the orders?

A. No, sir; the priest didn't.

Q. Do you know from whom he got the orders to go?

A. No, sir; I don't know from who.

Q. Now, you say he knocked at the door of the sisters and told them this?

A. Yes, sir; they came out.

Q. Did you have any conversation with them at that time?

A. Yes, sir.

Q. State that, please?

A. Well, they said in regards to the other two children, the conversation we had at that time. I will have to go back to Clifton to commence on that. After this last meeting was held in Clifton and we returned to this room Mr. Swayne thanked me for what I

206 had done and said he should remember me; and he said if it was in his power to accommodate me in anything he would be more than pleased to do it. I told him he didn't owe me anything for what I had done for him, but I says, "I will suggest one thing, that I may place two of those children at Morenci." He says, "I am perfectly willing you shall do it, but," he says, "I may not have any more to say about them than I have about these." But he says, "You have my permission." This was in Clifton. Well, after we got to Morenci he made the same statement to the sisters that just testified; that if it was agreeable with the people of Morenci, that I

should have my pick of two children, of the, I think, 21 children that was in the house. The sister says, "We will only be too glad." That was about the last of the conversation, just before he taken the train.

Q. Well, at that time was it, or was it not, the understanding of Swayne and the Sisters that they would not be permitted to take the children away?

A. That he would not?

Q. That the sisters would not be permitted to take the children away?

A. Oh, yes, it was understood they weren't permitted to take the children away.

Q. And in view of the fact they weren't going to be allowed to take any of them away, it was understood that this could be done?

A. It was understood, that fact—I understood it the same
207 as they did; they weren't in shape to be taken away.

Q. And under those circumstances you were permitted this selection?

A. They didn't say whether it was under those circumstances or not.

Q. You came and took two away, did you?

A. I didn't take them; I went and got them.

Q. I don't mean by force.

A. I went and got them myself; I think it was about nine o'clock, and I asked the sister—the children *was* all taking breakfast—I asked the sisters if I might take those two children; that I hadn't had any sleep or rest for two days and nights, and I would like to return to Clifton. She says, "Just as soon as they finish breakfast we will dress you the children."

Q. And they did so?

A. They dressed the children and helped me select the children.

Q. How about the third child that was taken from Morenci?

A. The third child was recommended by Mr. Mills and different other men that hold positions there. Mr. Davis was in Clifton and he had phoned up to ask his friends to select him one of these children—that is Dr. Davis, as he had been the Morenci physician for years there and had quite a few friends there; and the child was picked out under the recommendation of these people.

Mr. T. D. BENNETT: The child is not in the room, or not in controversy.

208 By Mr. Chief Justice KENT: Are the two children that the witness says he took away subject to these writs?

Mr. T. D. BENNETT: Yes, sir. We are developing this for the purpose they are the only two children who don't stand on the same footing as being taken from the Mexican homes in Clifton.

Mr. Associate Justice DAVIS: Norton is not one of the two?

A. No, sir.

Mr. IVES: One is Edward Comisky and the other Anna Kane.

Mr. Associate Justice DAVIS: And the third child you have spoken of is not involved at all?

Mr. IVES: No, sir; she is in Los Angeles.

A. But the children had been taken from the Mexicans and returned to the hotel, but I didn't get them from them, I got them from the rooms in the hotel.

Q. Do you remember anything about the circumstances of taking the children in Clifton out of the Mexicans' homes?

A. I was not there; I was in Morenci at the time. I knew they were being taken for Mr. Simpson sent the message when Mr. Swayne positively refused to be dictated to by the people, Mr. Simpson went and phoned to Clifton and they collected the children.

Q. The people did.

A. Yes, sir.

Q. Well, now, Swayne made a speech to the people at Clifton, did he not?

A. Yes, sir.

Q. At that speech did he say he would refuse to abandon
209 the children or anything to that effect?

A. Yes, sir; he made the statement he refused to abandon the children.

Q. To any people there?

A. Yes, sir.

Q. Was that speech at or before the meeting held in the drug-store in which they came to the agreement?

A. It was before.

Q. Now I want to come back to the conversation you had with Sister Anna with respect to their intentions of visiting these children and taking them back. I asked you the question once or twice and you said not at that conversation. State where that was?

A. That was separate from the conversation that Mr. Swayne and I had, that I had the conversation with the sisters.

Q. What was that conversation?

A. The sister had a letter, the sister that just testified. She says, "If we have made a mistake it is not our fault." She says, "I have a letter in my possession written to this institution by the priest, and that he has recommended these people to us as being English speaking people," as Castilians; I believe that is the way she said it; "read and write the English language," and were not at all responsible for the possession of the children, or the position that the children are now in. That the homes that they were placed in, that the
210 father is responsible as he recommended all the homes, and these children come assigned to these people; and she says, "We have no more to do with it, but," she says, "our whole intention is to stay here and visit the homes of each and every child; and if it is not proper we will replace them."

Q. That is, take them away?

A. They just said replace them.

Q. Where were the sisters when the children were taken away from the Mexican homes at Morenci or Clifton?

A. They were in the hotel.

Q. At Morenci?

A. Yes, sir.

Q. How long had they been in these homes, the children, before they were taken away by the people?

A. I don't know what time of day they were distributed; they were distributed when I arrived in Morenci at 2 o'clock.

Q. On what day?

A. On the 3rd.

Q. They had been distributed around among the people?

A. Yes, sir. I arrived there between one and two.

Q. You mean one and two o'clock at night?

A. No, sir; in the afternoon, on Sunday evening. No, I have got mixed up a little on this. Yes, Sunday evening.

Q. Between one and two o'clock Sunday evening?

A. They were all placed.

211 Q. And the car arrived Saturday night, the carload of children arrived Saturday night?

A. That is the way I understand it; yes, sir.

Cross-examination.

By Mr. WALTER BENNETT:

Q. Where were you, did you say, when the car first came into Clifton; were you present?

A. I wasn't at the depot; I was in Clifton.

Q. Was anything done that night with the children when they come in, anything towards distributing them?

A. Not that I know of.

Q. When was your attention first called to the fact of the children being there?

A. Being there or being distributed?

Q. Being distributed?

A. About 12 or 1 o'clock Sunday evening I was called; I was at home in bed.

Q. You mean in the middle of the night?

A. No, 12 or 1 o'clock next day, on Sunday.

Q. Between the morning, the time when the train arrived, some time Saturday evening, and one o'clock next day the children had been all distributed?

A. By two or three o'clock; I am not positive about the hour; but they were distributed in Clifton and in Morenci on Sunday at three o'clock when I arrived there between two and three o'clock.

212 Q. Then all the distribution was done both at Clifton and Morenci between two and three o'clock Sunday?

A. Yes, sir.

Q. Were you present during the time the distribution was going on, when the children were being given away?

A. No sir; I wasn't.

Q. Do you know the people in Clifton to whom these children had been distributed, the Mexicans?

A. Not all of them; I know a part of them. I know them when I see them.

Q. What kind of people were they; what kind and character of people were they?

A. Well, I don't know whether I am able to decide what they are or what nationality they are. I think they are a mixture between Indian and Mexican.

Q. What is the character of their homes, do you know them, where they live?

A. I am not familiar with them.

Q. State to the Court generally what is the character of their homes?

Petitioner objects to the question.

Mr. IVES: Suppose it is conceded that a mistake was made; it was conceded there and we were not permitted to rectify it; therefore we suggest that this matter is immaterial and irrelevant as well as incompetent in this proceeding. We shall therefore introduce
213 an objection as to the character of these homes one way or the other.

Mr. Chief Justice KENT: Do you mean you will admit that these people were unfit people to have charge of them?

Mr. IVES: No, sir; we don't admit anything of that kind. It is in evidence and undisputed that we tried to rectify what was conceded to be a mistake. We will now concede upon the record that the placing of these children, the places where these children were placed, were unfit places and unfit families for them to be placed in.

Mr. WALTER BENNETT: We desire to go further, even though it be conceded that the places where these children were placed were unfit places and unfit families for them to be placed with, we desire to go further and show the nature of the places and the kind of people they were placed with. The respondents are directly and indirectly charged with raising an indignation meeting, and we desire to show to the Court the foundation for that natural indignation which was raised in the breasts of the people of Clifton and Morenci. We desire to show further than that a mistake was made, and further than that the people were unfit to have charge of the children, we desire to show the character of the people with whom they were left, as showing the reason why the people of Clifton and Morenci were aroused in this matter.

(Objection argued to the Court by counsel.)

Mr. Chief Justice KENT: We will adjourn here until Monday morning, at half-past nine o'clock.

214 Adjournment taken till 9:30 a. m. Monday, January 16th, 1905.

MONDAY, *January* 16, 1905, 9.30 a. m.

L. J. DUNAGAN, resumed the stand, and his cross-examination was resumed as follows:

By Mr. WALTER BENNETT:

Mr. Chief Justice KENT: A majority of the Court are of the opinion that the evidence is proper in this case, and the objection will be overruled. (Petitioner excepts to the ruling of the Court.)

Mr. Chief Justice KENT: In view of the fact that you made the

statement on the record that you would admit these matters, with the suggestion that this testimony need not therefore be brought out or considered, if you desire to withdraw that statement from the record, you may do so.

Mr. IVES: I do desire to, and I would ask leave to amend my answer to the return in this particular: In paragraph three of my answer in effect I admit their allegation—my answer reads, the amended paragraph is: Petitioner admits that the minor, William Norton, is a white, Caucasian child of the Anglo-Saxon race. That on or about October 1, 1904, the petitioner brought the child to the Territory of Arizona and placed him temporarily—the language in the allegation is "abandoned him"—and placed him temporarily in the keeping of a Mexican Indian whose name is unknown to the respondent, and who was unable properly to feed, clothe, shelter, maintain and
215 educate said child, and who was otherwise, by reason of his race, mode of living, habits and education, entirely unfit to have the care, control, custody and education of said minor. But petitioner denies that petitioner ever abandoned the said child to the keeping of said Mexican Indian, and alleges that when petitioner left the said child in the keeping of said Mexican Indian temporarily as aforesaid, the petitioner was informed and believed that the said person was a Spaniard, financially able to properly feed, clothe, shelter, maintain and educate said child, and was in all respects entirely fit to have the care, control and education of said minor. I ask leave to amend by substituting for paragraph three in my answer to the return this paragraph. Paragraph three in my return denies the allegation; this admits it, all except the word abandonment. I admit it *verbatim,* except I say he was temporarily placed, but deny that he was abandoned. I admit everything in the allegation except that.

Mr. MCFARLAND: If the Court permits at this hearing that we introduce evidence on that, we have no objection to the amendment.

Mr. Chief Justice KENT: The amendment will be allowed.

Mr. IVES: With that admission in the pleading, I renew my objection.

Mr. Chief Justice KENT: You now admit a portion of that by your pleading. Formerly you had admitted it on the record. The
216 admission on the record is stricken out, but the amendment is permitted. However, we still think the evidence is proper, and the objection will be overruled. (Petitioner excepts to the ruling of the Court.)

Mr. IVES: We object further to this evidence on the ground that it is not proper cross-examination. We did not examine Mr. Dunagan on anything of this kind.

Mr. Chief Justice KENT: This suggestion that is made, if counsel for respondent desire to speak to the Court to it, we will hear them. It seems now that the objection may be well founded; that strictly this is a part of the respondent's case, rather than the petitioner's case, and this is not a matter on which the witness was examined on the examination-in-chief.

Mr. WALTER BENNETT: We are inclined to take that view of the case, and concede the point.

(Objection sustained by the Court.)

Mr. WALTER BENNETT: I commenced the cross-examination of Mr. Dunagan when the Court adjourned on Saturday evening, but in the short time I have been connected with the case I have not become so familiar with the facts that arose in Clifton as Mr. McFarland is, and I ask that he be allowed to continue the cross-examination.

Mr. Chief Justice KENT: Very well.

By Mr. McFARLAND:

Q. What time was it that you left Clifton for Morenci on Sunday, October 2nd?

217 A. Between 12 and 1 o'clock.

Q. What time did you arrive in Morenci?

A. Between one and two, as near as I remember.

Q. Was any one with you?

A. Yes, sir.

Q. Who?

A. Thomas Simpson.

Q. Any one else besides him?

A. That went from Clifton? That is all.

Q. How did you go up to Morenci?

A. Went up in the hack.

Q. About what time did you arrive?

A. In Morenci, about between one and two o'clock, as near as I remember.

Q. That was in the afternoon Sunday?

A. Yes, sir; that was in the afternoon Sunday.

Q. How long was it after you arrived in Morenci that you found Mr. Mills, the superintendent?

A. Only a short time; a few minutes. I went to the hotel——

Q. Did you go to the hotel first?

A. Yes, sir; but couldn't find Mr. Swayne. I seen Mr. Mills sitting down below the hotel on the track, and he motioned to me to come down.

Q. Did any one accompany you to Mr. Mills?

A. Mr. Simpson.

Q. How long was it after that before you found the agent of the sisters?

218 A. I found the sisters when I first went up, before I had seen Mr. Mills; but didn't find the agent the same time. I guess it must have been an hour or possible more.

Q. Did Mr. Simpson and Mr. Mills accompany you to the hotel?

A. Yes, sir.

Q. Were they present when you found the agent?

A. Yes, sir.

Q. Wasn't the entire conversation between you and the agent at the hotel?

A. The entire conversation?

Q. The conversation that occurred between you and the agent was at the hotel?

A. Yes, sir.

Q. Were Mr. Mills and Mr. Simpson present during the entire conversation?
A. Yes, sir.
Q. Did you explain to the agent the conditions that existed in Clifton in respect to these children?
A. I did, sir.

Petitioner objects to the question, on the ground that the witness should state what he said to him.

Q. Just state what you said to the agent in respect to the placing of these children, the places that they were placed in Clifton?
A. I don't know just word for word as I stated it, but I can tell the substance of it.
219 Q. Well, the substance of it?
A. I think Mr. Mills was the first man that talked to the agent, Mr. Swayne. He never mentioned the Clifton question to him at all; he was mentioning the Morenci question to him; and he asked him if he was familiar with these people that they placed the children with, and asked him if he knew what they were.
Q. Mr. Mills asked the agent that?
A. Yes, sir.
Q. What did he say?
A. Mr. Swayne says, "We know them by recommendation through our father."
Q. State what, if anything, was said in that conversation by Mr. Swayne as to whose business it was to place those children?
A. Mr. Mills went on and stated about the condition of these people; that they were indigent, had no trade, no means, and didn't draw sufficient salary to support families or educate them either, that they didn't educate their own children; and if they were placed with those people that couldn't speak the English language he thought it advisable for him to be advised by the people.
Q. What did he say?
A. Mr. Swayne says, "I'll not be dictated to by the people." He says, "I've been in this business for some years"—I don't remember the amount of years; and he says, "We don't propose to be dictated to by the people." He says "These people are recommended
220 to us by our father as Castilians." That is about the same statement.
Q. What, if anything, was said by the agent at that time about these children being placed there, and remaining there?
A. He did.
Q. What did he say?
A. He said they were placed and would be left placed, would remain.
Q. In Clifton?
A. Speaking of Morenci at this time.
Q. How about Clifton?
A. This was between Mr. Mills and the agent in regard to Morenci. He said about the same about Clifton.
Q. That they were placed there and would remain there?

A. Would remain.

Q. Was that information that you got from the agent there conveyed to Clifton?

A. The same; yes sir.

Q. How long after that conversation with the agent did you convey that information to Clifton, if you conveyed it at all?

Petitioner objects to the question, as misleading.

Q. Did you convey that information to Clifton—the fact that the agent declined to take these children back, or declined to remove them or take any action whatever with respect to these children to Clifton—was that information conveyed to Clifton?

221 A. I don't exactly understand the question now.

Q. In other words, did you—were the people of Clifton told what the agent told you in Morenci?

A. They were phoned to within an hour or an hour and a half after talking to Mr. Swayne. Thomas Swayne phoned to Clifton and told them Mr. Swayne had refused to take any action or be advised by the people. The next message that was received from there—I received it—stated that they had collected the children, most all of them, and they had them in the hotel.

Q. After that message was received, did you communicate that fact to the agent?

A. That the children were collected? Yes, sir.

Q. Then what, if anything, did he say?

A. I don't remember just what he did say.

Q. What did he say about correcting any mistakes that he had made, if anything?

A. With reference to what?

Q. I mean after you got the message from Clifton that the children had been gathered up and taken to the hotel, did you advise the agent of that fact?

A. Yes, sir.

Q. Was any further conversation between you and the agent in respect to the children after that message was delivered to you?

A. Well, he didn't—it was only general conversation. He

222 didn't say at that time—he didn't say what action he was going to take when he arrived at Clifton; he didn't make any statement.

Q. About what time was that you received this message from Clifton?

A. I think it was, as near as I can remember, about—it was after the collection of the children at Morenci; it must have been about 10 or 11 o'clock; possibly. I don't remember the exact time. I was pretty busy, I can't remember.

Mr. Associate Justice SLOAN: 12 o'clock in the evening?

A. About 10 o'clock Sunday night, I think; as near as I remember.

Q. You didn't go to Morenci as an officer, did you, in this matter?

A. I didn't go with any warrant or to make any arrest. I just went to bring Mr. Swayne and the priest down. The people had

asked me to go. I told them I would go up and bring him if he would come, but I couldn't bring him; I had no warrant.

Q. Did he go with you voluntarily?

A. Yes, sir.

Q. Did you use any force to compel him?

A. No, sir; I asked him if he would go, and he said he would.

Q. You say you are deputy sheriff up there?

A. Yes, sir.

Q. When you went to Morenci that Sunday afternoon, did you have any arms with you?

223 A. Yes, sir.

Q. Is that your custom when you travel from place to place, to carry your side-arms?

A. Yes, sir.

Q. Had you any different arms on that occasion than you have on ordinary occasions when you go on official business?

A. No, sir.

Q. Or business connected with your office?

A. No, sir.

Q. Were the children gathered at the hotel when you returned to Clifton?

A. At Morenci?

Q. No; at Clifton?

A. They were at the hotel; yes, sir. They told me they was there. I didn't see them that night, but I know they were.

Q. This is about the Clifton children?

A. Yes, sir.

Mr. IVES: They were in the hotel?

A. Yes, sir.

By Mr. MCFARLAND:

Q. When the agent, as you say, declined to take any action in reference to the Clifton children or the children that were placed in Clifton, you say you communicated that fact to the Clifton people?

A. Mr. Simpson did.

Q. Were you present when the communication was made?

224 A. Yes, sir—it was sent——

Q. Did you recommend or suggest any course to the Clifton people in the matter?

A. No. sir.

Q. There was no suggestion made by you or Mr. Simpson so far as you know, as to the children?

A. To the Clifton people? No, sir; I never made any suggestions to the people; I made suggestions to him, to Mr. Swayne.

Q. You know these people who have these children now?

A. Yes, sir; most all of them. I know them all when I see them.

Q. They live in Clifton?

A. Yes, sir.

Q. Do you know anything about their financial ability to take care of these children?

Petitioner objects to the question, as not cross-examination.

Mr. MCFARLAND: We will not press it, in view of the objection.

By M. R. IVES:

Q. Mr. Dunagan, before you went to Morenci, I think you testified you were asked to go there by the people of Clifton, five people?
A. Yes, sir.
Q. In your direct-examination did you give the names of those five people?
225 A. Yes, sir.
Q. Now can you state whether any of those people are respondents in this present proceeding?
A. I don't exactly understand.
Q. Do any of those people have children?
A. Yes, sir.
Q. How many of them?
A. Mr. Simpson, Mr. Wright, Mr. Abrams; three.
Q. Who are the other two?
A. Mr. Riordan and Mr. Jake Abrams—he had one but it is dead now.
Q. Was there any officer of the law at Morenci when you went there?
A. No, sir.
Q. When you arrived at Clifton from Morenci you testified that the Clifton children were in the hotel at Clifton?
A. Yes, sir.
Q. At that time had the Morenci Children been collected?
A. They were collected before we left Morenci.
Q. By Mr. Swayne?
A. And the priest; yes, sir.
Q. Were the people at Clifton advised that Swayne and the priest had voluntarily collected the Morenci children before the Clifton children were distributed to their present holders?
A. No, sir; they weren't advised that they had voluntarily
226 collected them; they were advised that they were ordered to collect them.
Q. And had done so?
A. Yes, sir.

Witness excused.

Sister ANNA LOYSIA, called as a witness on behalf of the petitioner, and duly sworn, testified as follows:

Examination by Mr. IVES:

Q. You are a Sister of Charity?
A. Yes sir.
Q. Were you connected with the New York Foundling Hospital?
A. Yes, sir.
Q. When was you first connected with the New York Foundling Hospital?
A. On the opening of it.
Q. Have you been more or less connected with it ever since?
A. Yes sir.

Q. How long ago was it opened?
A. In 1869, October 11.
Q. Are you familiar with the habits and customs of the New York Foundling Hospital?
A. Yes sir.
Q. Will you please state the custom with respect to the abandonment of children by mothers in the hospital?
227 A. The child is placed in the crib by its mother.
Q. Is the child ever placed in the crib by anyone else except the mother?
A. No, not unless we were apprised that the mother is in dire condition—then we have to have a doctor's certificate to that effect. We only take the children from the mothers.
Q. If the mother bears the child there, or brings one there, is she at liberty or not, to remove the child from the hospital?
A. Yes, sir.
Q. Is she at liberty to remove it after she puts it in the crib?
A. Yes, sir.
Q. Even after she puts it in the crib?
A. Yes sir.
Q. Does the Foundling Hospital assume any custody of the child before the mother puts it in the crib?
A. No sir.
Q. When a mother brings a child to the hospital, do you ask her any questions with respect to whether she is a married woman or not?
A. Yes sir.

Respondent objects to the question.
Mr. WALTER BENNETT: We cannot see how this is in any way connected with the issue now before the court to determine.
228 Mr. IVES: I have got to prove that all these children are properly in the custody of the hospital. You traversed that.
(Objection over-ruled by the Court. The respondent accepts to the ruling.)

Q. If the woman answers that she is married, what is done with respect to the record of the child?
A. The name and number of the child is entered, and the word "legitimate" after it.
Q. If the woman answers that she is not married, what is the record of the child?
A. Foundling.
Q. In this particular instance, can you state whether any one of these children is legitimate from the record?

Respondents object to the question.
Mr. WALTER BENNETT: We don't think it is necessary to have in the records of this Court the question of the legitimacy or illegitimacy of these children.
(No ruling by the court.)

A. I haven't charge of the records.

Chief Justice KENT: We understand the witness is unable to answer this question. We would desire to know whether you desire to press this question if it should come up later.

Mr. IVES: I think it is very material for reasons that will
229 come up later.

Mr. Chief Justice KENT: We will pass upon it then later.

Mr. T. D. BENNETT: The matter is already of record in the case in the record that was admitted by the court.

Q. Now, can you state what is the care and treatment of the children received in the Foundling Hospital?

Respondent objects to the question as immaterial. This is not a question as to the care and treatment they receive in the hospital.

Mr. Chief Justice KENT: We will receive the evidence.

(Respondent *accepts* to the ruling.)

A. The children are nursed, if they are young babies, and each mother has the charge of two children that is able to nurse them; and they are fed between times, and possibly if they don't require nursing from the mothers, they are fed as the doctor orders the food for the child. Each child gets food according to its age, the proper food for the ages of such children; and that is laid down by the doctor.

Q. Can you state the treatment with respect to cleanliness?

A. I think everything possible is done to keep the child just the same as its own mother would keep it, a good careful mother.

Respondent objects to the question as immaterial.

230 Mr. IVES: You will concede that the children are taken care of in the best possible way in the hospital, will you? If you will, I will save this time.

Mr. WALTER BENNETT: We see no necessity of conceding anything which is not raised by the record. There is no allegation of the nature of the care they receive, and there is no traversing of any such allegation. It is entirely outside of the record as to the treatment the children receive when they are brought into this hospital.

Mr. Chief Justice KENT: We shall assume, in the absence of any proof to the contrary, that the children receive proper care in this hospital, being an institution for that purpose.

Q. Do you keep all the children under your custody in the hospital?

A. No, sir, we have not room for them.

Q. What do you do with the children for whom you have not enough room?

A. We place them out at nurse; a woman applying for a child, a young baby to be nursed, has to bring a certificate from her doctor that she is a healthy woman, in condition to take the child and nurse it; and others have to come also recommended by a physician
231 or clergyman, that they are good, careful people; that is, women who take children who are weaned. The young children are placed in the custody of women who are recommended by physicians as being a good healthy woman to nourish a child, and they

are obliged to bring those children to the institution once a month on the day they receive their payment, and then the child is examined and our agents, and others visit the children during the month, to see if they get proper care, and a report is made to the Asylum if they do not; in that case, we withdraw the children if there is any complaint as to the proper care that they receive.

Q. Do you pay people for taking care of children?

A. Yes, sir, we pay for the very young babies, ten dollars a month, and supply all the clothing, medicine, and everything that the child requires, and for older children, as we call them, "run-arounds", we pay eight dollars a month and supply everything that is needed.

Q. Please state what is the policy of the institution in placing children out in homes, with respect to its being known either by the children or others, whether they came from the Foundling Hospital or not.

A. We feel it is better for the children not to know anything about their nativity, as it might be considered a stigma for the child, we consider it is better for the child to go to homes when they are quite young, and they will consider the people taking charge of
232 them as being their fathers and mothers; and we are very careful not to have it known—we would like them to forget they had ever been in the Foundling Hospital, so that no question can be asked about their nativity.

Q. Do you retain any supervision over these children after they have been placed in homes?

A. Yes sir.

Q. How long?

Respondent objects to the question as irrelevant and immaterial.

Mr. WALTER BENNETT: I cannot see the purpose unless it is to establish a legal right. If it be in the nature of establishing a native right, that must be not by custom but by their charter, and what their custom is it seems to me makes no difference in this case.

Mr. IVES: I want to *prima facie* establish the extreme care which they take of these children.

(Objection argued to the court by counsel.)

Mr. Chief Justice KENT: There are many features in this case and the evidence sought to be introduced may be relavent in some of them.

(Respondent *accepts* to the ruling of the court.)

A. The girls until they are eighteen, and the boys until they are twenty-one.

Q. During such times do you receive reports from the people who have them?

A. Yes, sir.

233 Q. How often?

A. Well, sometimes some of them three or four times a year and perhaps less than that; but we require them to report about the child at least once a year.

Q. Is it the custom of the sisters to visit these homes?

A. Yes sir.

Q. Even after the children have been there a long time?
A. Yes sir.
Q. When they visit these homes, do they communicate with the children the fact that they came from the Foundling Hospital?
A. No sir.
Q. Does your institution make reports to the State of New York?
A. Yes sir.
Q. In making report to the State of New York, do you include a report of the children whom you have placed in homes?
A. Yes sir.

Respondent objects as to what report they make to the State of New York.

Mr. WALTER BENNETT: I maintain a report to the State of New York is impossible. The State of New York is not such an entity as can have a report made to it. It must be to some institution of the State of New York, or some officer. We insist it is irrelavent and immaterial what the custom is, and has no bearing on the case.

234 Mr. IVES: I want to prove that the State of New York, until these children are of age, retains the supervision of them, and report every child that they have, whether they are dead or where they are; that the State of New York itself is really the controlling power.

Mr. WALTER BENNETT: We apprehend that such was the purpose of counsel, and if that be true, let them produce the statute or law of the State authorizing it, and through what arms of the State of New York such a report is made.

Mr. Chief Justice KENT: The view of the majority of the court is that the evidence should not be received. The objection will be sustained.

Mr. IVES: Upon the ground that I used the word, the State of New York, instead of the officers of the State, or generally?

Mr. Chief Justice KENT: The view of the majority of the court is that it is a matter of statutory law, rather than a matter of custom; that what attitude the State of New York may assume towards these children, is assumed by virtue of the law of the State of New York.

Q. Can you state how many children have been received by this institution since its inception, approximately?

A. Well, I think since we opened, I don't remember just
225 the last number now, but we receive over one thousand a year, and have received that number since we opened.

Q. That is, you have received over thirty-five thousand in all?
A. Yes sir.
Q. How many are in the institution now?
A. Well, we have generally seven hundred in the house, and the others are placed out with nurses and different persons.
Q. And how many do you have placed out with nurses?
A. Well, the balance of the nineteen hundred; we have about nineteen hundred under our care now.
Q. Is it your custom to place children out in homes when they are very young, or apprentice them?

A. We place them in homes where we feel that they are to be brought up as their own children.

Q. And of the thirty odd thousand whom you have received, and who are not at present in the hospital, all of them virtually have been placed out at homes.

A. Yes sir.

Cross-examination by Mr. WALTER BENNETT:

Q. If the object of the institution which you represent is to have the children in good homes, what is the objection of the institution to the homes in which these children now are?

Petitioner objects to the question.

236 Mr. IVES: It don't appear that there is any objection of the institution to these homes; it appears that the institution wants to assert its rights. We object to the question as containing a conclusion.

(Objection argued before the counsel.)

Mr. Chief Justice KENT: We ruled on this question in relation to another phase the other day. The same ruling will be adopted now. The objection will be overruled.

Mr. IVES: Did the Court notice the form of question?

Mr. WALTER BENNETT: I will re-frame the question.

Q. Is there any objection made by the institution which you represent to the homes in which the children in question now are.

A. Those children are placed in those homes without any authority from us at all.

Q. That doesn't quite answer the question. Let me ask it once more, perhaps in a different form. Does the institution which you represent, have any objection or any grounds of objection to the homes in which the children now are?

Mr. IVES: I will ask first if she knows them; whether she has any knowledge. I haven't examined as to her official position in

237 the instittuion. There is no evidence whether she has any authority in the institution at all, or whether she knows what the purpose and motive of those in authority might be. I think there should be some evidence as to that before this question is allowed.

Mr. WALTER BENNETT: It is not a question of motive or purpose at all. It is the question that I have asked as to what objection the institution she represents has to these homes, if there is any objection to these homes. Now the witness has testified——

Mr. Chief Justice KENT: We will allow the question. You may answer it.

A. As I am not the Superioress of the institution, I could not answer that question. I don't know what her objections may be.

Q. Are you, and those who are associated with you in this proceeding in authority to act for the institution in this matter.

A. No sir.

Q. Then neither yourself nor any of the sisters who are with you, nor Mr. Swayne, have any authority to act in this matter at all?

A. No sir.

Q. You have been connected with this institution since what year—1869 I think?

A. Yes sir.

Q. You are familiar with the practice and custom of the institution?

A. Yes sir.

238 Q. Have you any objection to the homes in which those children now are?

Petitioner objects to the question as immaterial.

A. I don't know anything about them.

Mr. Chief Justice KENT: We will allow the question. (Petitioner accepts to the ruling of the Court.)

A. I don't know anything about the homes. Of course I would not say for the children to be placed in homes I didn't know anything about.

Q. Then if you know nothing about the homes, do you know anything which would make these homes improper homes for the children where they now are?

Petitioner objects to the question as immaterial.

Mr. Chief Justice KENT: She has testified she knows nothing about them.

Q. Does the institution which you represent have any difficulty in finding good homes for the children which they have to put out?

A. No, it requires a little time and inquiry, and all that.

Q. Are there plenty of people in the State of New York who are willing to take the children?

A. I don't know as we have gone very much through the State of New York seeking for homes for them.

Q. Why were these children sent so far from the institu-

239 tion, out to the Territory of Arizona?

A. They were sent on application of the clergyman here. We thought he had selected good homes for the children.

Q. Is it the policy of the institution to send the children so far from the parent institution?

A. Not necessarily.

Q. Have they ever placed other children in Arizona?

A. No sir.

Q. Have they ever placed children in New Mexico?

A. No sir.

Q. Have they ever placed them in the western states or territories at all?

A. Yes sir.

Q. Where?

A. I am not prepared to answer the question. I don't keep the records of the children.

Q. Then how can you say there are children?

A. I know there are children have gone to the west. I don't know what part of the west.

Q. You don't know what states or territories?

A. No sir.

Q. Are these children sent out from the institution usually upon the application of the priests in foreign states and territories?

A. Yes sir.

240 Q. Without any further investigation other than the mere application of the local priests?

A. If there is time for the agent to visit the homes, they are visited before the children are placed in them; if not, they are visited immediately after. The sisters remain long enough in the place they go to, to visit the homes; and if they are not homes that they wish the children to have, the children are withdrawn. People understand that very well.

Q. What poeple understand that?

A. The people who take the children.

Q. In this case, no investigation was made of the homes before these children were placed there?

A. There was not any time.

Q. Mr. Swayne was the agent of the institution, was he?

A. Yes sir.

Q. For the purpose of placing these children?

A. Yes sir.

Q. He came with these children?

A. Yes sir.

Q. And was present when these children were placed?

A. I was not with the children when they came out. When they were distributed here, I was not with them.

Q. Then as I understand it, you were not in the Territory of Arizona at the time this matter arose at all.

A. No sir.

241 Q. You were in New York with the institution?

A. Yes sir.

Q. You know nothing of what occurred here?

A. No sir, only what I know from the sisters.

Witness excused.

SISTER FRANCES LIGUORI, called as a witness on behalf of the petitioner and duly sworn, testified as follows:

Examined by Mr. IVES:

Q. You are a Sister of Charity?

A. Yes, sir.

Q. How long have you been connected with the New York Foundling Hospital?

A. Since the opening.

Q. And have been there all the time since then?

A. All excepting a few months.

Q. 35 years?

A. Yes sir.
Q. What position do you occupy in the hospital?
A. I have nothing specially to do with the children, excepting to work and one thing and another, as sacristan.
Q. Did I understand you to say you were the sacristan?
A. Yes, sir.
Q. What are the duties of the sacristan?
A. To look after the chappel and things necessary about it.
242 Q. Were you present with the children who were brought to Clifton and Morenci?
A. Yes, sir.
Q. Were you present when the car arrived at Clifton?
A. Yes, sir.
Q. Did you leave the car and go with the children to the priest's house?
A. No, sir; I remained with the ones who remained in the car.
Q. Then you know nothing whatever about the placing of the children at Clifton?
A. Not at Clifton.
Q. You left Saturday night with the children and went to the hotel at Morenci?
A. No, sir; Sunday morning. We remained in the car all the night with the children.
Q. You went Sunday morning with the children to Morenci?
A. Yes, sir.
Q. Did you go to the preist's house at Morenci?
A. Yes, sir; we all went.
Q. When the children were being distributed?
A. Yes, sir; nurses, sisters and children.
Q. Were you in charge of the distribution of the children?
A. No, sir.
Q. Who had charge of it?
A. Sister Anna.
243 Q. Who testified here Saturday?
A. Yes, sir.
Q. Were you present at the house when the children were distributed?
A. Yes, sir.
Q. How many rooms were there in that house?
A. Two.
Q. During the time of the distribution was the door open between the two rooms?
A. Certainly. The children were in the one room and we were in the outer room.
Q. Did you all the time remain in the outer room?
A. Yes, sir.
Q. Will you please state who were present during the distribution?
A. The father——

Mr. Chief Justice KENT: We understand this to be at Morenci?
A. Yes, sir.

Mr. Chief Justice KENT: After they had been at Clifton?

Mr. IVES: Yes, sir. She stayed in the car at Clifton and didn't go out.

Q. Now who was there at Morenci when the children were distributed?

A. The priest and the man who assisted him, our children, nurses and ourselves.

244 Q. Who do you mean by "ourselves?"

A. The three sisters and the nurses.

Q. Was Mr. Swayne present?

A. Oh, yes; I forgot Mr. Swayne.

Respondent objects to the question and the evidence.

Mr. WALTER BENNETT: We don't think this testimony of what occurred at Morenci is an issue; but it is true some testimony was introduced as to what occurred at Morenci, and we have no objection to it, if the Court desires to go into it. All the children in dispute are children that were distributed at Clifton, except the two that were given to Mr. Dunagan; but aside from that none of the Morenci children are in this proceeding at all. Now, of course, so far as they go into this, we shall desire to put in a reply.

Mr. Chief Justice KENT: You will be given that privilege.

Q. Was any one else present?

A. No, sir.

Q. You are quite sure of that?

A. I am certain there was no one in the house.

Q. How many nurses did you have with you?

A. We had four.

Q. Three sisters and Mr. Swayne?

A. And Mr. Swayne; yes, sir.

Cross examination.

By Mr. WALTER BENNETT:

Q. When you left Clifton for Morenci you went with the car, did you?

245 A. Excuse me?

Q. When the children were taken from Clifton to Morenci, you went with the rest of your people?

A. We went in wagons; yes, sir.

Q. Now, the whole of your people went; the nurses, the sisters, and Mr. Swayne?

A. Yes, sir; we went Sunday morning.

Q. All your party went?

A. Yes, sir.

Q. None were left in Clifton?

A. No, sir; but it was the intention of our Superioress that the sister and myself—we were three sisters, and were sent in order to remain. When I asked my Superioress how long I would be away from home, she said she couldn't specify any time, as each and every child was to be visited——

Respondent objects to the answer, as not responsive to the question.

Mr. Chief Justice KENT: Yes, that may be stricken out.

By Mr. IVES:

Q. Now, will you please state what instructions you received from your Superioress, if any, with respect to this matter, before you left?

Respondent objects to the question, on the ground that it makes no difference what instructions were given to these parties.

246 Mr. WALTER BENNETT: The question we have to deal with is the situation which arose and actually did occur in Clifton; it is not a question of what instructions were given to these parties: Whether they obeyed those instructions could not be known, and was not known to the respondent in this case; and what instructions were given to this party is utterly immaterial.

(Objection overruled by the Court, and respondent excepts to the ruling.)

A. I received this instruction from my Superioress, namely, to remain as long as it was necessary to visit each and every home, and if the homes were not what was represented by the letter, we were to take the children east with us. And when I asked Sister how long, she said sho could not say, but I was not to leave. And the sister who was to remain with me is sick and therefore she could not be here.

Q. Do you remember any conversation between Sister Anna and the priest at the time the children were being distributed at Morenci?

A. I heard a few words, which were, of course——

Respondent objects to the testimony regarding any conversation between Sister Anna and the priest when the children were being delivered at Morenci, when it is testified there was no one present except Sister Anna and Mr. Swayne.

Mr. Chief Justice KENT: What is there in this to take it out of the ordinary rule?

247 Mr. IVES: I want to show that Sister Anna was very displeased at the character of the people, and protested, and the priest constantly protested back that they were all right.

Mr. Chief Justice KENT: The conversation they may have had, how can it be competent against these respondents?

Mr. IVES: Competent to show the motive—and motive is the test of abandonment under the law—there must be a settled purpose to abandon. The conversation don't go to prove the fact, it only goes to prove the motives of the people who were conversing. To that extent it is not hearsay.

(Objection sustained by the Court as to any conversation.)

Q. Do you know about how old the priest was?

A. I couldn't say.

Q. As far as you could guess?

A. He was a young man; I couldn't say.

Q. About how old would you think him to be?

A. Perhaps a man about 28 or 30, or thirty-odd—I couldn't say.

Q. Do you know what his nationality was?

A. It would appear to me French.
Q. How would it appear to you?
A. By the accent.
Mr. Chief Justice KENT: Where is that priest now?
A. I don't know, sir.
Q. What occurred in the distribution of the children in the priest's house at Morenci, as between the priest and Sister Anna and
248 others concerned?

Respondent objects to what occurred at this time.

Mr. WALTER BENNETT: The witness has already locked the door to this and shown there was no one present but her own people; and what occurred in that house, it seems to me, so far as she has closed the door so far as any one else being present there is concerned, she should be debarred from showing what occurred there.

Mr. Chief Justice KENT: What occurred between the people representing the institution and the people who came for the children? Is that the question?

Mr. IVES: As between them all.

Mr. Chief Justice KENT: But no others were present besides these people.

Mr. IVES: Yes, sir. In other words, Your Honor said the objection was sustained as to the conversation. I am not endeavoring to frame the question to meet the ruling.

Mr. Chief Justice KENT: We will allow the witness to show what took place at the time in relation to the distribution of the children.

(Respondent excepts to the ruling.)

Q. What took place in relation to the distribution?

A. As far as I remember, the man whom the priest had called each, as he had this paper—of course, every person who gets a child has to apply to the Asylum.

Q. Did the people come in one by one?
249 A. Yes, sir; only; and several were objected to.
Q. By whom?

A. By the sister; and of course didn't receive children. And then sister told the priest that each and every child, if the home didn't suit us, would be taken back; and only on that condition were they given.

Respondent objects to the conversation between Sister Anna and the priest, and moves that it be stricken out.

Mr. Chief Justice KENT: We will allow it to stand.

(Respondent excepts to the ruling.)

Mr. Chief Justice KENT: I didn't fully understand you. Did you say when objections were made some children were not given to the persons who made application?

A. Were not given for the present, for reasons I didn't understand; but I know they weren't given, because we took some back to the hotel.

Q. Did the priest make any protest to Sister Anna at any time if she objected.

A. In some instances he said we were very hard to suit.

Cross-examination.

By Mr. WALTER BENNETT:

Q. In how many instances were children refused to those who applied?

A. As far as I remember, in Morenci—of course, in Clifton I know some were taken back to the car; how many, I don't remember; but in Morenci, as far as I remember, I think there were three or four. I am not certain exactly.

Q. These children when they came out from New York were ticketed and tagged by number, name, and having on them the name of the person to whom they were to go, were they not?

A. Yes, sir; that is always done.

Q. It was done by the institution, was it not?

A. Yes, sir; that is always done.

Q. Then you say Sister Anna objected to some, and they weren't given to those whom she objected to?

A. No.

Q. Then Sister Anna did have authority about it before from the institution in this instance not to give to those who were thought not fit?

A. Because we were likewise told not to give any children to people that weren't satisfactory.

Q. Then the matter was left in the discretion of Sister Anna after all, was it?

A. To a certain extent; but we have to apply to the Sister Superior in New York after.

Q. Did Sister Anna first apply to the New York institution to know whether she should deliver these children to the people to whom she objected?

A. Hardly, in that circumstance—how could she?

Q. As a matter of fact, she did not?

A. No, not there and then.

Q. Did she exercise her authority to refuse to deliver these children to the ones to whom they had been ticketed?

A. Two or three she thought were not fit by appearance.

Q. Then she did have the power and authority so to do?

A. I don't know. I can't answer that.

Q. She did do so?

A. Yes, sir.

Q. Those, then, to whom the children were delivered were approved first by Sister Anna?

A. Only temporarily.

Q. But they were approved temporarily?

A. Well, as far as I know.

Witness excused.

GEORGE W. SWAYNE, called as a witness on behalf of the petitioner and duly sworn, testified as follows.

Examined by Mr. T. D. BENNETT:

Q. What is your occupation?
A. Agent for the Sisters of Charity of New York Foundling Hospital.
Q. How long have you been connected with that institution?
A. About seven years.

252 Q. On or about the first of last October, what, if any, business did you have in the Territory of Arizona?

A. I was entrusted to place a certain number of children there.
Q. At what place did you come in Arizona?
A. Clifton.
Q. How many children were in your charge there?
A. Forty.
Q. Who was in charge with you of those children?
A. Three of our sisters, four nurses, and myself.
Q. What occurred at the time you arrived at Clifton?
A. When we arrived there there was a pretty lively crowd around the depot. We, anticipating trouble, perhaps, from the crowd there, locked the doors of the car and refused admission to everybody.
Q. What, if any, experience had you had in placing children in Arizona prior to that time?
A. None whatever.
Q. During the last seven years you have been connected with that institution, do you know of any other children that have been placed in Arizona?
A. None.
Q. Have any been placed in Mexican homes along the border and in New Mexico?
A. No, sir.
Q. Had the institution or its officers any experience with the character of the homes of Mexican families?

253 A. No.

Q. And what was the recommendation that induced you or the institution to bring those children to Arizona to place them where they were originally placed?
A. Several months before that, in the usual mode of our business, circulars were sent out to the different parishes in Arizona. Among others, we received a reply from the pastor at Clifton and Morenci, stating that he was only there for a short time, and that he had hardly had time to know the people and their habits, but he approved of our work, and if at some future time he saw the people were fit to take our little ones, he would be only too happy to inform us.
Q. Do you know from him what his experience was as a resident of Arizona?
A. No.
Q. From your conversation with him, was he an American citizen?

A. No, he was of foreign extraction.

Q. At the time you locked the door were the people to whom the children were subsequently assigned, there at the car?

A. That I couldn't say positively. There was a crowd of people there; some of them might be other parties.

Q. What became of the children afterwards, and what was done right afterwards?

A. The priest entered the car and we had some conversa-
254 tion with him, and wagons were outside; and we put these children in that were intended for Clifton, and drove them up to the priest's house.

Q. Was he the regular priest there, or just a substitute?

A. We found out afterwards he was temporarily there; that the regular priest, Father Atkin, the man that was there for many years, had had his first vacation at that time, and had gone to the old country to pay a visit and see his friends.

Q. At the distribution of these children what occurred?

A. When we got up to the house the children were placed there, and three of the sisters and the nurses, some of them, and myself; then the priest called out the names of the parties, and they entered the room. The first three or four were objected to on account of their color—they had all the indications of Indian blood, and we naturally objected to placing our children with them, and refused those parties. Then we told the priest to give every one of those people to understand that those little ones were simply entrusted with them for the time being, and that our sisters would remain there as long as necessary to visit and examine every home——

Respondent objects to the answer, and moves that it be stricken out.

Mr. WALTER BENNETT: We understand this was a conversation at the house to which no one was admitted by the parties who came out with these children; and we don't think it is proper to be
255 introduced as between these parties and the respondents.

Mr. Chief Justice KENT: The motion will be denied. We will receive evidence of the circumstances of the giving up of the children.

Mr. WALTER BENNETT: And the statements made by Mr. Swayne and the sisters and the priest to one another at the time of the giving up?

Mr. Chief Justice KENT: I thought the evidence sought to be elicited was as to what took place between the parties taking the children and the witness. (Objection argued to the Court by counsel.)

Q. What, if any, instructions had you concerning the disposition of these children when you arrived at Clifton?

Respondent objects to the witness relating what his instructions were.

Mr. WALTER BENNETT: It seems to us it does not make any difference what their purpose or intention was; it is not an issue in this case; it makes no difference. (Objection overruled by the Court, and respondent excepts to the ruling.)

A. Well, it was generally understood not being thoroughly posted on the character of people there we ought to act with extra caution, and for that reason the sisters were instructed to stay there and see the homes; and if they were approved finally, then to leave the children there. And those instructions were to be carried out.

256 Q. What were your intentions with respect to complying with your instructions with respect to the distribution of these children at Clifton?

A. They were to be carried out entirely as given to us; we were to obey orders.

Q. Did you communicate to the local priest there, and to the people, your instructions, the general purport of them, and your intentions concerning those instructions as to the disposition of these children?

Respondent objects to the question, as leading and suggestive, and instructive. Objection sustained by the Court.

Q. What, if anything, did you do concerning the carrying out of your instructions, in the way of communication to the people at Clifton?

A. As each child was delivered the pastor told them just the conditions that we had told him; that the children were simply given to them on approval, and subject to our examination; that the sisters would remain there a sufficient length of time to examine those homes thoroughly, and then when they were approved finally they would have the children, subject to our regulations.

Q. After the children were disposed of, or a portion of them, at Clifton, you then proceeded to Morenci?

A. Not immediately after the children were distributed; we immediately proceeded back to the car. We had our own car

257 all the way from St. Louis, a tourist car for the comfort of the children.

Q. When did you go to Morenci?

A. Sunday morning; left between 7 and 8 o'clock, and took all the remaining children, 24, all the sisters, nurses and myself, and the priest.

Q. Did you go there with your car?

A. No, there was no railroad communication between the two places.

Q. When did you first have any objection to placing these children—that is, an objection made to you from the residents there?

A. That was the Sunday afternoon after the children had been delivered at Morenci?

Q. What was the nature of the controversy that occurred there at Morenci?

A. When I came back and had arranged at the hotel for accommodations for the sisters, nurses and children that were left, and myself, our baggage was then taken out of the wagon that brought it over and left in the public square; and while I was attending to it there three gentlemen came up—I don't know their names, but three men came and asked me what I was doing. I told them I was carrying on my business of placing children; and they had some

talk, and I told them, why, that was my business, and I understood my business. After that I got the baggage up in the hotel,
258 and so the sisters settled the children and nurses, and I went to my room, partly undressed myself, got changes of underwear, linen, etc., and went to the bath-room; and while I was there I heard a loud noise in the hall, talking and all that; and finally there was a rap on the door. When I opened the door Mr. Dunagan was there, and he told me they wanted to see me. I said, "Very well, gentlemen; I will be out in a few moments." So I partially dressed myself and went out. And Mr. Dunagan and a couple of others—Mr. Mills I know was there; and I asked them into my room. When we got in the room Mr. Mills started in to tell me the kind of people that we had left the children with there. I told Mr. Mills our intentions in regard to visiting those homes, and everything of that kind, as I have explained to you before. After that we had some further talk, and Mr. Mills told me the feeling that was there between the white American people and the Mexicans. I then said to Mr. Mills, "Mr. Mills, it is never the intention of our institution to make any trouble in any place we go, and those children will be removed and brought back to this hotel before nightfall. The children in Clifton, as soon as we get a chance, we will do the same with." That was positively stated, and stated in the presence of Mr. Dunagan. He knows that to be a fact.

Q. Continue right along with what occurred there?

A. Then after that was settled I started out with the priest and his chief man, and we went all over those hills and notified
259 every one of those families that the children was required to be delivered to the hotel within an hour. They got them back pretty near in that time. After they were back Mr. Dunagan informed me that there had been trouble in Clifton and my presence was necessary there. He never told me that the children had been taken away, or anything of that kind—that I was not aware of. Well, we got the children in, and there was considerable loud-talking, and quite a crowd at the hotel, and some pretty lively threats as to tar and feathers were made.

Respondent objects to the statement as to there being pretty live threats, unless the witness brings them home to the people who made them.

Mr. Chief Justice KENT: You may specify, then, about the matter of threats, stating who they were made by, and what they said, and all.

Q. Who was present, if you know?

A. They were all strangers to me.

Q. Do you know Mr. Simpson?

A. No. Mr. Dunagan says he was the party that was with him.

Q. You know who the man was that was there with him?

A. No, sir; not by name.

Q. Is Mr. Simpson present? (Mr. Simpson stands up in the audience.) Do you know whether this is the gentleman?

A. That is the gentleman that was present.

260 Q. What were the threats, and what was said in the presence of Mr. Simpson and the other people who were there at the Morenci hotel?

Respondent objects to witness stating what was said, unless he first states who said it.

Mr. WALTER BENNETT: This question, "What was said," the Court will see at once it is impossible for us to contradict this witness when he makes the broad statement this and that was *was* said; the party that said it cannot be brought before the Court to deny it, even if it is untrue.

Mr. Chief Justice KENT: The witness will be as specific as he can.

Q. Do you know who made these statements?

A. I could not say, because they were all in a crowd and shouted out from different parts of the crowd.

Q. How big a crowd was it?

A. It filled the entire vestibule of the hotel at Morenci.

Q. Approximately how many people?

A. I would guess 100 people.

Q. What was said?

A. They made all kinds of threats, called me all kinds of names, and were a pretty lively crowd, that's all.

Q. Just what was, as near as you can remember, the language of the threats made, the nature of the threats and the language used?

261 A. They would threaten to tar and feather me, run me out of town, and hang me.

Q. Thereupon what occurred?

A. That was when I came down stairs. I told those people what we intended to do up there, and that we would do it; but they said I had to leave; so then the priest, myself, and his man went out and gathered in those children. When I got back all the children except one had been brought to the hotel. They wanted to know where that child was. I says, "Gentlemen, we have done our part as we promised you. We have notified every one of those people. This one perhaps was a little further out, but it will surely be here." And the child was brought in. But while we were going up to the Morenci hotel, the priest and myself, there is an incline up there—there were three or four parties, and among them Mr. Bull, made a rush and went to grab the priest. I said, "No, you won't touch him." He says, "We want to take him down and fix him up." I says, "Nothing of the kind," and stepped before him. Before that, before there was any disturbance, Mr. Dunagan came down and told them not to have any trouble, and explained the position he was placed in; and they obeyed; they showed respect for Mr. Dunagan.

Q. What did Mr. Dunagan do?

A. He came down there and protected us.

Q. In what way did he protect you?

A. He stood between us and the crowd and escorted us up

262 to the hotel.

Q. When did you go to Clifton, the same day?

A. That night. Then when the last child was brought in—before the child was brought in Mr. Dunagan wanted to take us to Clifton and the crowd wouldn't let him do it until every child was brought into that hotel. When they were all there Mr. Dunagan and this Mr. Simpson, the priest and myself got into a surrey and drove down the mountains. We arrived, I think, at Clifton about near 12 o'clock; I can't be positive of the hour.

Q. 12 o'clock Sunday night?

A. Yes, sir; 12 o'clock Sunday night; it wasn't Monday morning—sometime near there. And we immediately drove over to the hotel. When we got to the hotel we registered and rooms were assigned to us, then we proceeded across that bridge to the public library. As we were getting to the public library we could hear that there was some commotion there. It seemed as if a crowd was all trying to talk together. When we went in the crowd called us all the names in the calendar, made us all kinds of threats. It was, "Tar and feather;" and they had all the preparations; they had the tar, they had the rope, and they had the feathers. Those men, the greater number, were loaded with pistols in full view there. Finally we got through the crowd and up onto a little stage perhaps as high as that table. That was not sufficiently high for the crowd and they put up a chair I should stand on. When I got up there they
263 continued their noise and disturbance. I called for order and insisted upon it, and finally I got order. When I got order I told them what we had done at Morenci in regard to the children; what we proposed to do there, the same, take them away. Then they said, "You can't do it; we have taken them away." That was the first time I knew our children had been taken away from the homes they had been entrusted to. I says, "Gentlemen, you have made a mistake; those children are ours, and we will have them, but", I says, "we will go to the Court and the Court will give us our rights." They said, "You have abandoned them." I says, "We have not abandoned them and will not abandon them;" and I stuck to it and would not back down for the crowd. Finally the meeting wound up by their instructing me to telegraph to our institution in New York for instructions as to whether those children could not remain in Clifton and be placed by them. I said, "No, I will not telegraph". I says, "I am here with authority for the institution in regard to those children. If they are not delivered as the institution intended, then the children will go back to New York, and I will take them back." One of the parties there—I forget his name, he was an ex-constable—was particularly boisterous and threatening, and he was about three-quarters drunk; he led the meeting, and he says, "You'll take them into Mexico and give them to the Mexicans." I said, "No, I have told you we will take them back to New York." He says, "Will you give us a bond?" I says, "We'll give you a bond for any
264 amount, a million dollars, if you want it." And then the meeting was adjourned until one o'clock on Monday, and we went to the hotel. When we got there we were met at the door by the proprietor. He says, "Gentlemen, there is no room for you at my hotel." I says, "Why not?" "Well," he says, "if I take you in

I will never do another day's business." I says, "You know the law. We've got a very good case against you."

Q. Who was that man?

A. I don't know his name.

Respondent objects to the evidence, as having no bearing upon the case.

Mr. Chief Justice KENT: We don't see what took place between the agent of the institution and the proprietor of the hotel has to do with it. You may leave that out.

A. We got accommodations on the other side of the river, and there was one room assigned to the priest and myself, and another room assigned to Mr. Dunagan and the deputy. They stood by us to protect us; and the next morning we got up, and then we heard that the children were at the hotel and were being distributed among the people there. Several parties came up to Mr. Dunagan and asked if I was under arrest. He told them no, I wasn't under arrest; he had no warrant, but he was simply standing by to protect my life. A little later I telephoned to the sisters in Morenci the result of the meeting on Sunday night. Sister Anna and Sister Lagouri drove over to Clifton.

265 Q. When they arrived in Clifton where did you see the two sisters?

A. They met me at the public library.

Q. Where did you go after meeting the two sisters?

A. We went right into the library.

Q. Was there any other meeting then?

A. Not just then. We expected the meeting to be at one o'clock. We talked in a general way what had happened the night before, and also what had happened at Morenci. After that I noticed there were very few people there, and about one o'clock some one came in and said that owing to lack of communication Judge Little and the sheriff of the county couldn't be there until the train came in in the evening, and that that meeting was adjourned until 8 o'clock Monday evening. When the sisters heard that they decided they would not remain, owing to the darkness and danger of the road, and being among perfect strangers, and they decided to go back. They left me, and I was still in charge of Mr. Dunagan. At 8 o'clock the meeting came along. It was a continuation of the Sunday evening affair, just the same disturbance.

Q. At the library?

A. Yes, sir. The same disturbance and the same threats; and I protested in the very best way that we had not given up the children and would not give them up; that I knew our rights and those rights would be asserted, if there was law in the land. They

266 finally told me I had to get out of town, and ordered me out; and the meeting wound up in considerable confusion. Then after the meeting was over, some little time after, Mr. Dunagan and the priest and two or three others got into the wagon and were driven back to Morenci. When we arrived in Morenci, as we got into the public square right under the hotel, we were met by the constable, I

believe, of the town, and he informed me that the Morenci people had decided to do the same as the Clifton people, that is retain the children and distribute them themselves, notwithstanding we had carried out our agreement with them. So I proceeded then to the hotel and went to the sisters' room and rapped on the door and received no answer. I came back to wait until about 5 o'clock on Tuesday morning, and then I told the sisters we had been instructed that the Morenci people were going to keep those children and we were ordered out of town on the 7 o'clock train, the nurses, sisters, and myself and the priest. So we had some talk about it, and the sisters decided they would not go; that they would remain with the children, even at the sacrifice of their lives. We all decided to do the same, and Mr. Dunagan came and he said, "Now, I'll give you a piece of advice." He says, "Mr. Swayne, I can't protect you and the priest any further than 7 o'clock." He says, "You will have to go out on that train." He says, "The sisters will be all right, and perhaps if they see some one in authority and explain their position, who they were and what they were, and their position in New York things might be changed; but," he says, "it is decided to keep
267 those children here." So then quite a crowd escorted me to the train with the priest, and we went off.

Q. Just before this, what occurred concerning the two children Mr. Dunagan spoke about?

A. When it was decided there that the children were to remain, Mr. Dunagan asked me if I would give him permission to select some of the children. I told him I would when the children were finally taken away from us; that I believed that, owing to his kindness and care of me he ought to have that privilege, as I had every confidence in him.

Q. Was that before or after you had been advised that all of these children must be left for distribution, and that the people there would attend to it?

A. After.

Recess taken till 2 p. m.

MONDAY, *January* 16, 1905, 2 p. m.

GEORGE W. SWAYNE, on the stand, and his direct examination resumed as follows:

By Mr. T. D. BENNETT:

Q. Were you acquainted with any of these people who have the present custody of the children?

A. No, sir.

Q. When you returned from Morenci after the Clifton visit, what day was that?

A. Tuesday morning.

268 Q. Did any one other than Mr. Dunagan have any conversation with you concerning the retention of the children by the people?

A. No, sir.

Q. What occurred after this incident that you have related this

morning concerning the two children that Mr. Dunagan had asked permission to place?

A. I don't understand the question.

Q. What occurred after the incident of the two children that Mr. Dunagan asked if he could have permission to place?

A. Then we were ordered out of town, had to go on the 7 o'clock train.

Q. Who went out of town?

A. The priest and myself.

Q. Who ordered you out of town?

A. Mr. Dunagan told us it was for our safety to get out of town.

Q. What became of the other 21 children at Morenci?

A. They were left there when I came away.

Q. Do you personally know who the two children were Mr. Dunagan took with him?

A. I wasn't there and didn't see the two children taken.

Q. You only know from hearsay?

A. I only know from hearsay.

Q. Where did you go with the other children, the 21 children?

269 A. I met them at El Paso and proceeded east.

Q. Where are they now?

A. They have been placed in homes.

Q. In the eastern part of the country?

A. In the east; different states, wherever the orders happen to be.

Q. In the United States?

A. Yes, sir.

Q. How long were you en route from New York to Clifton?

A. We left New York on Sunday evening, and arrived at Clifton on the following Saturday evening. We were delayed coming through New Mexico on account of the washouts for 11 or 12 hours.

Q. At the time the children were delivered were they travel-stained or dusty?

A. Hardly any; we take the best care of them we can, and wash and dress them coming along in the cars. They don't wear the dresses they are delivered in; simply the house aprons and cravat; so we deliver them always in first-class order, clean and neat.

Q. How many children have you delivered in various parts of the United States since your association with the Foundling Hospital?

A. I have been there nearly seven years; I guess about 3,000, perhaps.

270 Q. At the time you distributed the children in Morenci were all the children you had with you in the car distributed?

A. No, sir; there were nine left.

Q. That is to say, there were nine in the hotel that had never been assigned anywhere?

A. Yes, sir.

Q. How many did you have altogether for Clifton and Morenci?

A. 40.

Q. Did you testify about the drug-store meeting?

A. No, I didn't.

Q. You heard Mr. Dunagan made that statement?
A. Yes, sir.
Q. What occurred at the drug-store at Clifton?
A. Well, we went over to the drug-store, and there was Judge Little and several other parties, and also a committee appointed by the people to go and see what was going on, that was about it. They told me, why, the conditions of affairs there; that the people had decided to keep the children, and that there was no way to do but to give consent to it. I told them I could not give consent to leave the children there; that our institution would get the children back. So then we proceeded to the meeting and Judge Little addressed the meeting, and told them what had been arranged there. He also read or told them the law in regard to adoptions in this State; that it was not possible for him to give adoption papers without consent of the institution. Then the meeting shortly after wound up
271 by us being ordered out of town.
Q. Who addressed the indignation meeting there besides yourself?
A. Father Mandin addressed the first meeting.
Q. Who else?
A. And myself.
Q. And the second meeting, who addressed that meeting?
A. I did.
Q. And who else?
A. Father Mandin.
Q. Any one else?
A. No, except Judge Little.
Q. Who is Judge Little?
A. I am told he is the Probate Judge of Graham County.
Q. Did he make any recommendation in his address to these people concerning these children; and if so, what did he say?
A. He told them they had no right to them whatever, and they couldn't acquire right without the consent of our institution.
Q. Did he suggest anything concerning guardianship or adoption?
A. He told them that he could not give them adoption papers; he didn't say anything about guardianship, as I remember.

Cross-examination.

By Mr. WALTER BENNETT:

Q. What is your connection with the New York Asylum?
272 A. Agent.
Q. How long have you been such?
A. About seven years.
Q. You are in their employ and paid for your services, are you?
A. Yes, sir.
Q. When did you leave New York with these children?
A. On Sunday, the 25th of September.
Q. You say you had certain instructions delivered to you at the time you took these children?
A. The instructions, no definite instructions in regard to those

children, but I have my general instructions as to how to carry on the business.

A. Then you had no instructions in reference to these particular children at all?

A. Only that it was understood we were to be extra particular about going into a new country, not knowing it only from the letters we had received; and we were to examine those homes before the children were finally left there.

Q. Did you receive such instructions?

A. I heard those instructions; they were stated in my presence.

A. To whom?

A. To the sisters and myself, all there.

Q. Were those instructions in writing?

273 A. No, sir; verbal

Q. Before these children were sent out they were, were they not, each one of them numbered and tagged with the name of the person to whom they were to be delivered?

A. Before those children were sent out each one, the girls had her name and date of her birth, the name of the party that they were going to, and the party's address, with the band number in the corner of that.

Q. Please explain?

A. The band number is 1 to 50; the number of children taken out on that band.

Q. What do you mean?

A. Those taken out, the children in the crowd. We don't want to call them a crowd; we speak of them as a band when we go out, whether it is 20 or 30 or 40 or 50, whatever number it is—the band. The "band" is going west. We had the band number from 1 to 40, or 50, the number we had. In the case of girls that is sewn in the ham of their dresses; in the case of boys generally sewn under the collar of the boy's sailor suit, or if it is a jacket, right here in the corner. That is for the purpose of identifying the children.

Q. Also the name of the person to whom they were to be delivered?

A. Yes, sir.

Q. So that the assignment of these children was made in

274 New York, was it not?

A. Yes, sir.

Q. By whom were these instructions delivered?

A. Sister Theresa Vincent.

Q. Who was present during the giving of the instructions for these particular children?

A. All the sisters that were coming out on the band.

Q. And yourself?

A. Yes, sir.

Q. Then do I understand discretion was given to those who were placed in charge of these children, as to the delivery of them, to whom they should be delivered?

A. Not to whom they were to be delivered, unless we found those

parties weren't suitable. If the parties were found suitable, then we had nothing else to do but to deliver them.

Q. Then you had no power to deliver those children except to those to whom they were all tagged?

A. If they were found suitable.

Q. You had no authority to deliver them to any one else?

A. Unless we had instructions.

Q. Were you instructed to deliver any children to Mr. Dunagan?

A. I didn't deliver any children to Mr. Dunagan.

Q. Didn't you say you consented Mr. Dunagan should take two of those children?

275 A. If the people of Morenci had taken them away, as the people of Clifton did.

Q. Did you so qualify it in your original statement?

A. I qualified it in that way; yes, sir.

Q. Were you present at the priest's house in Clifton when these children were delivered?

A. Yes, sir.

Q. Who else was present?

A. Two of our sisters and three of our nurses.

Q. Any one else?

A. The priest and the people that were going to get the children came in as their names were called.

Q. Did they come in one at a time?

A. Might have been three or four come in together.

Q. Did I understand you to say the priest explained to these people that these children were only placed in their care temporarily?

A. Every one of them.

Q. In what language did he talk ?

A. He spoke in the Spanish language.

Q. Do you understand the Spanish language?

A. No, but I understand Latin, and I know that he told them that.

Q. Can you talk Latin?

A. I have a pretty fair understanding of it.

276 Q. Do you mean to tell the Court that because you are a Latin scholar you could tell what the priest said in Spanish?

A. Enough to know that he told them this.

Q. And you tell the Court that he instructed each one of these Mexicans that these children were only placed in their care temporarily?

A. Yes, sir; that was my instructions, and I believe he did so.

Q. Do you mean to say he did so state, or that you believe he did so state?

A. That he did; he did so state.

Q. As a matter of fact, you don't know whether he did so state, or not?

A. As a matter of fact I know his instructions, and I know what he said in every case, the words were identically the same. I got accustomed to the form of what he told them, and it was always the same.

Q. You knew what he said in Spanish?
A. I understood the purport of it.
Q. Did he repeat this formula to every one of these parties to whom he delivered the children?
A. Every one.
Q. These people were received in one at a time?
A. One or two or three might have been in the house at a time, but each party came for the child and was told before the
277 children were delivered.

Mr. Chief Justice KENT: I would like to have you say just what it was the priest was told to tell them?

A. The priest was instructed to tell every one of the people that those children were simply left in their charge until such time as the sisters could go around and examine personally each home; that if they weren't satisfied with the homes, satisfied that the homes were all right in every way, as represented, then the children would be taken away from them.

Q. Do you say he repeated that to each one of these people to whom he delivered a child?
A. Yes, sir.
Q. And he spoke it in the Spanish language, which you do not understand?
A. Yes, sir.
Q. You are ready to testify he did so state?
A. That was his instructions, and we believe he carried them out faithfully.
Q. You saw these people then to whom these children were delivered?
A. Yes, sir.
Q. You approved of the delivery of these children to those people?
A. For the time being until we could inquire into their character.
278 Q. You left Clifton with these children in the possession of those people?
A. We did.
Q. You and all the sisters and nurses?
A. Yes, sir.
Q. Did you know at that time that these people were Mexican-Indians?
A. We didn't know that they were Mexican-Indians at any time.
Q. Could you not tell by their color and general complexion that they were Mexican-Indians?
A. No, sir.
Q. Were they not all dark complexioned people, not in the nature of white people?
A. Not all dark, some were light.
Q. Can you say which one was light?
A. No I can't give the name of the individual.
Q. Can you give the name of a single one that was not comparatively black?
A. I could not mention any name.

Q. Were these people, when they appeared at the priest's house, such as commended them to your consideration as proper custodians for these children?

A. For the time being, until we could investigate them, except in some instances.

279 Q. In accordance with your instructions to be very careful about the delivery of these children, you delivered them to these people?

A. For the time being.

Q. Where was the first time you were before the crowd, that you speak of, was it Morenci or Clifton?

A. There were two crowds.

Q. Which was the first time?

A. The first crowd was at Morenci.

Q. Is that the crowd in which you told the Court that there was threats of tar and feathering you, and also of hanging, and that they had the implements there to do it?

A. No, sir.

Q. Where was that?

A. That was at Clifton.

Q. Did you see the tar?

A. No, sir; I didn't see it.

Q. Did you see the feathers?

A. No, sir.

Q. Did you see the rope?

A. No, sir; but they were called to my attention; I was told they were there.

Q. You swore that they were there upon some one's statement to you that they were there?

A. No, sir; I didn't swear they were there.

280 Q. You didn't?

A. No, sir; I didn't—that is my recollection.

Q. Then you saw neither tar, feathers or rope?

A. No, sir.

Q. Did you give the names of the people who first called upon you in the hotel in Morenci—do you now remember who they were?

A. Mr. Mills, Mr. Dunagan and the other gentleman.

Q. You know Mr. Mills, do you—that is, you would recognize him if you saw him?

A. Oh, yes.

Q. Was there anything in their manner or conduct which was of a threatening nature at all?

A. No, sir; not those gentlemen.

Q. Those men treated you courteously, did they?

A. Certainly; yes, sir.

Q. It was at their request, then, you went before the people at Morenci, was it?

A. For what purpose?

Q. I said it was at their request that you went before the people at Morenci?

A. Yes, sir; that I went to take the children away.

Q. Through this whole proceeding Mr. Dunagan protected you from what you believed to be the threatening attitude of the people?

A. Yes, sir.

281 Q. He was kind and courteous to you through the whole proceeding?

A. Yes, sir.

Q. You had no fear of your life in Mr. Dunagan's hands, at Mr. Dunagan's hands?

A. None whatever, no.

Q. Mr. Dunagan was in the performance of his duty protecting you?

A. I suppose he was; he was a deputy sheriff, and that was his object.

Q. He was armed, was he?

A. Yes, sir.

Q. Was there any threat made towards Mr. Dunagan, that you heard of?

A. No, sir.

Q. At any time was there any threat of taking you from under the protection of Mr. Dunagan?

A. Yes.

Q. Who by?

A. The people at Morenci.

Q. Threats to Mr. Dunagan?

A. No, not to Mr. Dunagan.

Q. You were under Mr. Dunagan's charge at that time?

A. Supposed to be; I was while I was in his presence at the hotel.

282 Q. You were not under arrest?

A. He told me definitely no.

Q. You went with him willingly?

A. Yes, sir.

Q. Was Mr. Dunagan present with you when you heard these threats you speak of against you?

A. No, sir.

Q. Was Mr. Dunagan present when the threats which you have testified to were made against yourself?

A. In the hotel at Morenci?

Q. Anywhere, or in that crowd at Clifton?

A. Yes, sir.

Q. You were still under the protection of Mr. Dunagan?

A. Yes, sir; at those two meetings and during the day at Clifton.

Q. Did you tell those who first requested you to take up these children at Clifton, urging you that they were not in the hands of proper parties, that they had been placed in the hands of those parties and they would remain there?

A. They would remain there until we had time and chance to investigate.

Q. Did you not say that they had been placed there and would remain there?

A. They would remain there until we had time to make an investigation.

283 Q. Did you so qualify your statement at the time?

A. I think so, sir.

Q. To whom did you make that statement?

A. To Mr. Mills and the gentlemen in that room.

Q. Was Mr. Dunagan there?

A. Yes, sir.

Q. And Mr. Simpson, was he there?

A. I can't say positive that he was.

Q. You say you didn't state definitely and distinctly that those children had been placed and would remain there?

A. Would remain there until we had a chance to investigate the homes.

Q. You are certain you did qualify your statement in that manner?

A. Yes, sir.

Q. Did you not state to those who were protesting against the children being left there, that you understood your business and refused to be dictated to?

A. Decidedly, for the time being; yes, sir.

Q. Where was it Mr. Dunagan requested that he might take two of these children?

A. I think it was in Morenci.

Q. Who was present at that time?

A. That I couldn't say.

Q. Was there anybody besides yourself and Mr. Dunagan?

A. I think Mr. Foster, if I am not mistaken.

284 Q. Mr. Dunagan had been very kind to you during all this time?

A. Yes, sir.

Q. Did you offer to pay him for his services?

A. No, sir.

Q. But you did offer to give him two of these children in pay for services rendered to yourself, did you?

A. No, sir.

Q. Did you not so testify this morning?

A. No, sir.

Q. What did you give him those children for?

A. I didn't give him the children at all.

Q. Did you not state in your testimony this morning that Mr. Dunagan having been very kind to you in protecting you from the people, and you thought it was no more than right he should have two of these children, and you therefore consented to have him take two of these children?

A. If the Morenci people did the same as the Clifton people by taking our children away.

Q. Did you qualify your statement that way?

A. Yes, sir.

Q. You are willing to rely upon the record of the stenographer in that respect?

A. Decidedly.

Q. Then you were authorized, were you, to consent that
285 these children should go elsewhere than into the hands of those people to whom they were tagged?

A. I was not definitely authorized to do that, no.

Q. Not definitely authorized?

A. No, sir.

Q. But you conceived that your authority over those children was such you could give them to other people, did you?

A. Yes, sir; if we were not satisfied with the homes they were placed in.

Q. Then it was within your power and discretion to have taken all these children and delivered them into proper homes?

A. Decidedly; homes we had orders for and were approved.

Q. Was it not in your discretion to take them and put them into homes you were not definitely authorized to?

A. No, sir.

Q. Why did you give those children to Dunagan?

A. I didn't give them to him.

Q. Why did you consent he should take them?

A. I didn't consent; I simply told him if the people at Morenci acted the same as the Clifton people, and took our Children away by force, then he might have the choice of the children.

Q. If the people in Morenci were taking the children from you by force, what authority did you have to give these children to anybody?

A. No authority.

286 Q. Then your consent to give these children to Mr. Dunagan was of no force or effect?

A. No, sir.

Q. Then this was your recompense to him for his services to you?

A. There was no recompense or payment; nothing of the kind thought of or understood.

Q. Did you not in your direct-examination this morning use the words that Mr. Dunagan had been kind to you and that in return for his kindness you considered it was no more than right he should have two of the children?

Petitioner objects to the question.

A. If the children had been taken away and we had lost control of them.

(Objection overruled by the Court.)

Q. Did you not so state this morning?

A. I stated if the children had been taken away from us the same in Morenci—if we had lost control of them as in Clifton, then he should certainly take any children he pleased.

Q. Did you state that in your examination this morning?

A. Yes, sir.

Q. And you are willing to have your testimony judged in this case by the correctness of your statement now?

A. Whatever is on the stenographer's minutes.

By Mr. IVES:

Q. When the priest was distributing the children at Clif-
287 ton, did he always speak in Spanish?

A. In some cases, and in some not.

Q. Did he in any case speak in English?

A. In some few.

Q. When the priest would speak to any of these families in Spanish, would he at any time tell you what he had stated to them?

A. No, sir.

Q. Are there any other foundling hospitals in the city of New York?

Respondent objects to the question, as irrelevant and immaterial.

Mr. Chief Justice KENT: What is the purpose of it?

Mr. IVES: The purpose is to prove that mothers who abandon their children have a selection of foundling hospitals in which they may deposit them; that this is a sectarian branch of a non-sectarian policy, and I think it is a well established principle of law that in matters affecting the custody of a child the religion desired by the parent, that is the expression of a desire by the parent with respect to religion, though not controlling, should have great weight. I want to prove simply that there are two other foundling asylums in the city of New York similarly supported; that they are of other sects, to show that mothers have the choice of selection.

Mr. WALTER BENNETT: Even should counsel be permitted
288 to show that there are other asylums of a similar character in New York, it would by no means show that the mothers had any oportunity to select. It must be known to the Court that at a time when the mother is about to abandon her child the person or the place or to whom she is to abandon it becomes utterly immaterial in her mind; and it cannot be predicated that because there are other asylums in the city of New York, that the mothers had selected or exercised a choice as to where they should abandon their children.

Mr. Chief Justice KENT: We will allow the evidence to be given.

(Respondent excepts to the ruling of the Court.)

A. Yes, sir; there are two.

Q. Supported by the state or city?

A. The same as ours; yes, sir.

Q. Are either of those institutions under the custody of any Roman Catholic religious orders?

A. No, sir.

Mr. WALTER BENNETT: Is this one?

A. Decidedly; yes, sir.

By Mr. IVES:

Q. Are the other institutions under any sectarian control; the other two foundling asylums?

A. Yes, sir.

Q. Under what?

A. I believe the Episcopalians.

289 Q. Both of them?

A. Yes, sir; I believe so.

By Mr. WALTER BENNETT:

Q. Did the Mexicans to whose these children being delivered by the priest talk English?
A. Some of them did some; yes, sir.
Q. Some of them did?
A. Yes, sir.
Q. How many of them?
A. That I couldn't say; I didn't remark the number.
Q. Is it not true that the large majority didn't speak English at all?
A. The majority of them, I believe did not.
Q. Under the representations that were made to the asylum by the priest, as I understand you to testify, one of those represeniations was that these were English speaking American citizens?
A. Yes, sir.
Q. Yet you delivered these children to these Mexican-Indians who could not speak English?
A. We didn't know they were Mexican-Indians.
Q. These people who didn't speak English?
A. We didn't know; we didn't speak to them.
Q. All the conversation you heard them carry on was in Spanish?
290 A. Yes, sir; because it was the language they best knew.
Mr. T. D. BENNETT: Did Father Mandin speak good English?
A. Not the very best, no, but fair.

Witness excused.

NEVILLE LEGGATT, called as a witness on behalf of the petitioner being duly sworn testified as follows:

Examined by Mr. T. D. BENNETT:

Q. Where di you live?
A. Clifton, Arizona.
Q. Your occupation?
A. Delivery man on the A. C. Company's store.
Q. That is the Arizona Copper Company?
A. Yes, sir.
Q. Were you in Clifton, Arizona, on the second of last October?
A. Yes, sir; I was.
Q. Were you there at the time the children, the New York Foundlings—were discussed at that town?
A. Yes, sir; I was there on the second of October. That was Sunday. I was not there the first day that they were brought into town at all.
Q. What did you do Sunday night?
A. I went around to the various citizens and asked them what they were going to do, and the citizens told me they were going to
291 have a general meeting at the library.
Q. After the meeting, what did you do?

A. After the meeting they appointed me on a committee of 25 to go around and get these children.

Q. Who others were with you on the same committee?

A. Quite a number. If you want the names I can give them.

Q. The ones that were with you personally—who were they?

A. Mike Riordan, George Fraser, Tom Horner, H. Bradley, S. Miller and your humble servant, myself.

Q. Was Mr. Fraser one of those who has a child at the present time?

A. Yes, sir; he has, but he didn't get him where we took them at all.

Q. How many of you went together at the time you took any particular child?

A. I don't think over two went at the same time; that is, of course, this way; I went to the house and told them who I was. I was acquainted with all of these Mexicans, and they opened the door, and I told them what I come for and they willingly gave up the children.

Q. What did you tell them?

A. That I was appointed by the citizens on a committee to get the children, and I told the boys then to come on and get the children while I went on to the next house.

Q. Do you remember the two children in the home of
292 Margarita Chacon?

A. Yes, sir; I do.

Q. Which were they? Do you know which ones they were?

A. I canot tell them now.

Q. Do you know who has those two children?

A. No, sir; I cannot tell you who has those two children. It was so dark that night and rainy——

Q. What kind of a night was it?

A. It was raining and a very wild night.

Q. What time of night was it when you took the children?

A. About half past 10 or 11 o'clock by the time we got over there.

Q. How long did you occupy taking the children?

A. We were there from a half to three quarters of an hour waiting for the persons to put the clothes on them.

Q. How long have you known Margarita Chacon?

A. Fourteen months—since I have been in Clifton.

Q. What was her occupation?

A. I do not know what you would call it. She is running a sort of small school among the Mexican children trying to teach them English. Her husband he works once in a while and the other times he is drunk on the streets raising Cain. That is all I know about him.

Q. How many of you went to her home that night and got those two children?

293 A. Four of us went up there but only one knocked at the door. That was George Fraser. He told her what he wanted and she said, all right. She fixed the children up, and Mr. Fraser went inside the house. Mike Riordan, Tom Horner and myself were outside waiting for the children to come out.

Q. Did you advise the other members of the committee concerning going to Margarita Chacon's house?

A. I told Fraser as we were going up there. I says, the only decent place the children were left at was at Cornelia Chacon's. And the other places, the lowest down places known as I told Fraser.

Q. You advised them to take those children?

A. I didn't advise them at all. I told them I was sorry I would have to take them away from there because they were honest people.

Q. What was the decision of the committee?

A. They said if we were going to take one, we might as well take all.

Cross-examination.

By Mr. McFARLAND:

Q. What was the first house you went to?

A. Alvidras. He had two, a boy and a girl.

Q. What kind of a house does he live in?

A. He lives in an adobe house.

Q. What kind of a house did you say he lived in?

A. Adobe house over there.

294 Q. How many houses did you visit?

A. Four.

Q. How many children did you rescue from these houses?

A. Six.

Q. How many from each house?

A. Two from the two different houses and one from the balance of the houses.

Q. Did you say you know these people?

A. Well, yes, sir. I am acquainted with them—well acquainted with them.

Q. How did you become acquainted with them?

A. Being in the position I am driving for the A. C. Company I am acquainted with every Mexican, Negro, Indian or American in North Clifton and across the river.

Q. What were the people that these children were left with?

A. Of course, I don't like to tell the truth but I will tell it right in front of the Court. They were prostitutes before they were right there where they are. Prostitutes on the streets of Clifton.

Q. How many of those families does that apply to out of the six?

A. Four out of the six.

Q. When you went to these houses to get these children was there any force or violence used?

295 A. No, sir; no force at all. I went up to the house and knocked at the door and they asked who it was; and I told them. They knew my voice and they opened the door, and asked what I wanted. I told them I had been appointed by the citizens of Clifton to get the children. They said "All right." As soon as they said that, I called the boys and I told them to get these children while I would go to the other house, because it was raining, and I wanted to get through as quick as I could.

Q. Did any of these people intimate a desire to keep any of these children?

A. No, sir; not one of them.

Q. Were they disposed to give them up willingly?

A. They gave them up willingly. There was only one house, Cornelia Chacon, said they did not like to do it. That was the one woman could talk the English language.

Q. How many of these Mexican families could talk English?

A. Just one, Cornelia Chacon.

Q. The one who has been spoken of here as "Chacon."

A. Yes, sir.

Q. Do their husbands speak English, do you know?

A. No, sir; only Lee Windom, and he married this prostitute that was on the street at Clifton. He is the only one who speaks English besides the woman Chacon.

Q. How many children had he?

A. Not one.

Q. Was he living in the house near them?

296 A. The house of whom?

Q. How many children did Lee Windom have?

A. None at all.

Q. Was he living in the house of one of these women that have the children?

A. Yes, sir; that is, he got one of them himself; his wife had one.

Q. His wife had one?

A. Yes, sir.

Q. Could she speak English?

A. No, sir.

Q. When those children were taken from those houses, what was done with them?

A. They were taken right to the Clifton Hotel.

Q. Did any of these people who took these children, say anything about paying for them?

A. Yes, sir.

Q. What did they say?

A. The last house I went to over there and got a child José Bonillas (?)

Objection to the answer.

Q. What conversation did you have with any of these people with reference to these children that you have not spoken about?

Petitioner objects to the question.

297 (Mr. Ives: He is attempting to establish not a condition of affairs, but a fact, that money was paid. That is, I think, hearsay evidence and is not competent proof.)

Q. Well, did this woman of whom you speak object to the delivery of the child to you.

A. Cornelia Chacon—Yes, sir, this way—

Q. If she did so, state how?

(Petitioner objects to the question as asking for a conversation

between this witness and this woman in order to establish a fact for an obvious purpose; to establish a fact which he knows he is not entitled to do, because he withdrew the direct question in which he endeavored to evoke this evidence.)

(By Mr. WALTER BENNETT: The petitioner's petition alleges that these children have been taken from the homes in which they had been placed by the New York Asylum by force and violence. The cross examination of this witness is directed, first, as to whether any force or violence was used; next, as to the question as to whether there was any reluctance or any desire on the part of these people to retain the children. In one instance, he says there was. Now, we desire to bring out what fact may have been which created this reluctance in the mind of this particular party, to surrender the child, and we think we have a right to do so. We are charged with having taken this child by force and violence.)

The COURT: We shall allow the question to be answered.

298 A motion, if desired, can then be made to strike it out.

Q. What was said by this woman? Did she object to the delivery of this child at all?

Objected to by the petitioner.

A. No, sir.

Q. Did she object to the delivery of it at all?

A. She objected in this way: She says to me in Spanish:

(Witness giving the words in Spanish.)

The COURT: This is the woman Chacon?

A. No, Bonillas, she says (Witness repeating words in Spanish.)

Q. State in English what she said?

A. She said, "Who is going to pay me the money I paid the Priest for this child?" and I said in Spanish, "You will have to see the father about that."

By Chief Justice KENT: As I said, we will not allow that as testimony of the fact that money was paid, but as one of the circumstances in this transaction; but we should not conclude from this nor make any finding that any payment of money was made if it should become material, because, of course, that is merely hearsay.

The petitioner objects to the answer and moves that it be stricken out.

The COURT: We will let the answer stand for what it may be worth.

299 (Exception taken by the petitioner to the ruling of the Court.)

Q. You do not know anything of the recovery of the other children in other parts of Clifton yourself?

A. No, sir; I was only assigned at North Clifton. I got all of the children at North Clifton. There were two across the river. The families I knew but I did not have a chance to go there to get them because the boys in the meantime had already got them.

Q. You have not any of these children?

A. No, sir, I have not. I have two of my own.

By Mr. IVES:

Q. This woman who spoke about money, did she say anything about money she had spent making clothes for this child?

A. No, she did not, not -at night.

Q. But she did at some other time?

A. She did at the time I went with Mr. Bennett.

Q. She said then she had been at an expense making clothes for the child?

A. Yes, sir; but that night she says "Who is going to pay me the money I paid the Priest."

Petitioner objects to the answer and moves to strike it out as not responsive.

(No ruling by the court.)

Q. Was not that her explanation when Mr. Bennett and
300 yourself went to her? Was not that her explanation of the remark she made to you that night?

A. No, sir.

Q. Was not the fact of her having made that remark to you that night the occasion of her saying again about this money, which resulted in the answer about her making clothes.

A. We asked no question at all.

By Mr. WALTER BENNETT:

Q. How long had this woman had this child?

A. It come down the first day of October, it was Saturday night, and it was the 2d day of October, when we took it away—the last child. That must have been about half past twelve. I know two of us fell in the flume—

Q. Then this woman had this child about twenty-four hours?

A. Yes, sir.

Q. The clothes she made for it must necessarily have been made during twenty-four hours?

By Mr. IVES:

Q. On the day when you and Mr. Bennett spoke to the woman about money, did you not speak to her in order to give her a chance to explain what she meant by the remark she had made to you when you first went to her?

A. I asked her that—yes, sir.

Q. And her answer was, she had made—

301 A. She had already paid the money to the Priest besides getting clothes for the child; that was her answer.

Witness excused.

Miss MARIAN TAYLOR, called as a witness on behalf of the petitioner and duly sworn, testified as follows:

Examined by Mr. T. D. BENNETT:

Q. What is your occupation?
A. I am one of the staff of nurses in the Foundling Hospital.
Q. In what place?
A. In the Foundling Hospital.
Q. In what city?
A. New York.
Q. Were you with the sisters who came to Arizona with the foundlings about the first of October?
A. Yes, sir.
Q. Were you present there in Clifton at the time the children were taken by the respondents from the first places where they were assigned?
A. Yes, sir.
Q. Where were they taken by the people, if you know?
A. To the Clifton hotel.
Q. Where were you?
A. I was in the hotel.
Q. Who else was there with the children beside yourself at that time?
302 A. No one that I knew; they were Clifton people.
Q. How many of them were there?
A. There were quite a number there, but I don't know how many.
Q. What did they do with the children; I mean with respect to distribution or anything of that sort?
A. Well, Mr. Abram told me that they had taken them away from the Mexicans and they were going to distribute them among their people.
Q. Do you know what was done after he said that to you, concerning the distribution of the children?
A. I know that some ladies came in and he gave them some of them; I saw some delivered to them.

By Mr. Chief Justice KENT:

Q. At what time was this?
Mr. IVES: On the night of Sunday.
Q. The day after the children had been given to the Mexicans?
A. It was Monday morning.
Q. You were back at Clifton at that time?
A. Yes, sir.

By Mr. IVES:

Q. What conversation did you have with the people concerning the children and their taking them, or with Mr. Abrams?
A. I told Mr. Abrams they had no right to take the chil-
303 dren, and they belonged to the sisters; and he said the sisters gave them to the Mexicans and they took them away from

the Mexicans, and they would keep them and do as they liked with them, and distribute them among their own people.

Q. Did you state to the people there and to Mr. Abrams in the presence of these people of the position of the Foundling hospital concerning the children?

A. I told Mr. Abrams that the sisters intended to stay in Clifton and Morenci and investigate the homes, and if any of them weren't suitable they would take the children.

Q. How many others were present at that time?

A. I think I was speaking to Mr. Abrams alone at the time.

Q. Did you stay there until the children had been assigned to the various other people?

A. I stayed in the room some time; and when I saw I couldn't do anything I left the room, and went upstairs.

Q. You were stopping then at the Clifton hotel?

A. Yes, sir.

Q. Now let us understand just exactly when this was. My understanding is it was Monday?

A. It was Monday morning.

Q. What time of day?

A. I should think it was between 8 and 9 o'clock.

Q. How many of the children were then in the hotel?

A. I think there were—I don't know how many, but they
304 were most all there. Some of them were lying on the floor yet, and some were running around, and some people had some of them on their laps.

Q. Who exercised any authority in the distribution of these children?

A. Mr. Abrams.

Q. Was that Mr. Jake Abrams or Mr. Sam Abrams?

A. The hotel proprietor.

Cross-examination.

By Mr. WALTER BENNETT:

Q. Did you go down with the sisters and Mr. Swayne from Clifton to Morenci?

A. No, sir.

Q. You stayed all the time at Clifton?

A. Yes, sir; up to the morning the sisters and children left Morenci. I went to Morenci that morning and went away with them. Before that I stayed at Clifton.

Q. At the hotel at Clifton?

A. Yes, sir.

Q. Did you see all of the children after they were brought back from the Mexicans?

A. I didn't say I saw all of them. I think some of them were given away before I knew it. I only heard it Monday morning between 7 and 8 o'clock.

Q. Did you see them directly when they were brought back
305 from the Mexican homes?

A. No, sir.

Q. How long was it after they were brought back from the Mexican homes?

A. The following morning.

Q. You didn't see them that night, then?

A. No, sir.

Q. Then you don't know anything about their condition when they were brought back from the Mexican families?

A. No, sir.

By Mr. Chief Justice KENT:

Q. I don't understand this. When did you first go to Clifton?

A. Saturday night.

Q. When did you leave Clifton?

A. Tuesday morning.

Q. You stayed in Clifton until Tuesday morning and didn't go to Morenci?

A. I went back and forth.

Q. When you got to Clifton Saturday night how long did you stay there without going away?

A. Until the following morning at 10 o'clock, I think, I went to Morenci for a drive and back again.

Q. Did you go with the sisters from Clifton to Morenci?

A. No, sir.

Witness excused.

306 Petitioner rests.

Mr. MCFARLAND: If the Court please, when the first announcement was made by the Court as to the procedure in this case, that the Court would be advised upon affidavit, rather than by testimony from the stand, at that suggestion of the Court we took the affidavit of Mr. Bull, who I find is the only one whose affidavit we have that is absent; and before any contrary announcement of the Court, Mr. Bull had gone to California, and is there now, so far as I know. This testimony—at least, the testimony of Mr. Bull, is confined to Morenci, to the time of the distribution of the children at that place and what occurred at the time of the distribution, and the conversation that occurred between the agent and the people who got these children. Now, if the Court please, under the circumstances—not that I know any one is particularly at fault, but the Court will see our condition, the attitude we are in by having obeyed the direction of the Court and allowed Mr. Bull to go, not knowing he would be needed to testify as a witness; and in view of those facts and circumstances, we ask to be allowed to read the affidavit of Mr. Bull on that point.

Mr. Chief Justice KENT: Have you other witnesses that will testify as to the same point?

Mr. MCFARLAND: No, sir; not one.

Mr. Justice KENT: Not to testify to the same facts?

Mr. MCFARLAND: *Now,* sir; not one. This is peculiar. This would, at least, be a very great hardship on us, if we could not
307 use this affidavit, for the reason that a large part of the testimony offered on the part of the relator is a conversation with

Mr. Bull, and the fact no one was in the house except the sisters, the agent and the parties who applied for the foundlings at the time of their distribution, and Mr. Bull's affidavit is upon that very question. And they seem to have anticipated this affidavit of Mr. Bull's by contradicting him in advance on that subject; and they put us in a rather awkward position and also leave Mr. Bull in a very unenviable position, if you allow these parties to testify as to what occurred when he was present, and now allow him to testify as to what he understood the facts to be.

Mr. IVES: I would suggest this question be passed upon after the other testimony is put in. I think the Court would be in better position then to pass upon it. We shall object to its being read now and then, but in view of Your Honors' declaration when the testimony was commenced that you would reserve your decision upon that matter, I would suggest it be deferred until the rest of the testimony is in, so that Your Honors may be the judges as to whether or not any unnecessary hardship is done them by Mr. Bull's absence, instead of Mr. McFarland being the judge of that proposition.

Mr. WALTER BENNETT: It certainly is true we have no other witness excepting Mr. Bull, who even claims to have been present at the time of the facts which Mr. Bull testified to. I can see no
308 object in withholding this testimony. It is to be resisted, and it seems to me the question should be decided now as to whether or not we should be permitted to introduce the affidavit of Mr. Bull. As I say, we have no other witness to testify about the facts which Mr. Bull testifies to. We have a number of affidavits, expecting them to be introduced under the suggestion of the Court. We do not desire to offer those because those people are here, but Mr. Bull has gone, and he went before there was any suggestion that there would be any change in the method of presenting this case; and it would be a great hardship upon us, if we are not allowed to introduce the testimony of Mr. Bull. Mr. Bull would have remained here to give testimony but for that announcement of the Court.

Mr. Chief Justice KENT: We will not pass on that application now. You may renew it later in the trial.

Mrs. LAURA ABRAM, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. MCFARLAND:

Q. Where do you live?
A. Clifton, Arizona.
Q. How long have you lived there?
A. 15 years.
Q. What is the name of your husband?
A. Samuel Abram.
Q. How long has he lived in Clifton?
A. 22 or 23 years; I am not quite sure.
309 Q. What is his business now?
A. He is the proprietor of the Clifton hotel, and Jake Abram is the manager.

Q. Have you a residence in Clifton?
A. Our own private residence.
Q. You have one of these little foundlings, have you?
A. Yes, sir.
Q. What is your financial ability to care for and educate that little fellow? Are you able to do so, financially able to take care of him?
A. I think I am; yes, sir.
Q. Have you any children of your own?
A. One.
Q. What is the age of that one?
A. He is 13 years old.
Q. Boy or girl?
A. Boy.
Q. What is the sex of the little one you have now?
A. A girl.
Q. What is her age?
A. She is two years old the second day of October; the day I got her.
Q. Is it your desire to continue the care of that little one?
A. Yes, sir.
310 Q. Were you in Clifton about the first of October last?
A. Yes, sir.
Q. Did you know that these little foundlings were coming to Clifton that day?
A. I heard that a car with about 40 little children was coming into Clifton to be given away to Mexicans.
Q. What time was it that you were advised in that respect?
A. About three or four o'clock in the afternoon.
Q. Were you at the train the evening of the arrival of these little ones?
A. Yes, sir. May I explain why I was there?
Q. Yes, if you desire?
A. I supposed that these little children being given to the Mexicans were Mexican children; and of course out of idle curiosity I went over to the train to see them come in.
Q. Were you there at the depot on the arrival of the train?
A. When we went over to the train there was quite a crowd of Mexicans around the car, but of course naturally we wished to see the children; and we got Mrs. Wright and Mrs. Parks and myself, got in the vestibule of this private car and looked in; and I was greatly surprised to see perhaps 40 little American children. The priest came out of the car and unlocked the door—the door was locked, of course, and as he came out he unlocked the door, and my friend turned to him and said—Mrs. Wright said, "Are these
311 children to be given to the Mexicans?" And he said, "Certainly not."
Q. Who was that, the priest?
A. Yes, sir; the priest.
Q. Go ahead.
A. Well, we were very anxious to get near these dear little chil-

dren, and we kept getting closer and closer to them as they came out of the car; and the priest seeing what interest we took in these children asked us if we wouldn't assist them in taking them off the car; which we were very glad to do. They didn't take all the children out of the car—I suppose they took about 14 or 15. I don't really know; I didn't count them. They placed all these children in hacks —I don't know whether there were two or three; there were two or three hacks at the station. I meantime took one of these children in my own arms and held it until all had been placed in the hacks; and as I held the little one I handed it to Mr. Swayne, and I said, "I'll keep this one;" and he said, "Not to-night," but giving me the impression I could have the child if I applied for it the next morning, in that tone of voice.

Q. Now you say there was a crowd around there; what kind of a crowd was it, what kind of people—I mean did you get the child then?

A. Then I handed the child into the arms of Mr. Swayne.

Q. After they were placed in the carriages what became of the children?

312 A. I don't know only by hearsay.

Q. Were they driven off somewhere?

A. They drove off.

Q. Did you see them driven off?

A. Yes, sir.

Q. Up which way did they go?

A. They went towards Chase Creek; that is, towards the Catholic church.

Q. You say there was quite a crowd around the depot when you arrived. What kind of people were those crowded around?

A. Right around me they were my few American friends; the rest were Mexicans.

Q. Where did you go after the children were driven off in these carriages?

A. I went back to the Clifton hotel.

Q. Did you go from there then to your home?

A. I did.

Q. What did you do next morning, if you know?

A. The first thing in the morning I dressed myself unusually early, Sunday morning, to go and see these little children.

Q. Did you go?

A. I went down to the hotel, and I couldn't tell you who told me, but they said these children, the little children that were driven off in the hacks—I want to give you the impression that afterwards——

313 Mr. Ives: I won't object.

A. I was told these children that were driven off in the hacks were driven to the Catholic church and given away to Mexicans.

Q. When?

A. The same night; that is Saturday night, and that the other children had been left in the car until morning and that the sisters,

the agent and nurses and children had driven to Morenci to be given away likewise, and that the private car had gone.

Q. That is the car the children came in? Now that was on Sunday morning?

A. Sunday morning.

Q. Were you at the Clifton hotel in the evening Sunday?

A. Yes, sir.

Q. When these children were brought into the hotel?

A. I was.

Q. Who brought them, do you know?

A. The committee that was appointed by this meeting; I couldn't name the gentlemen's names because I didn't know them all.

Q. You say you were there when they came with the children?

A. Yes, sir.

Q. Did they come in all at once, or did they come in at different times?

314 A. They came in one at a time, and perhaps some came two at a time; just happened as the committee should come there at the same time.

Q. What was done with them when they were brought to the hotel?

A. It was a rainy night, and we had warm blankets, and as they came in we placed the little children in these blankets, all in the same room. It was Mrs. Abram's parlor; and as they came in one at a time we just placed them there until they could get warm and we could feed them.

Q. What was the condition of those children when they came in?

A. May I answer just one thing before I say what was their condition? I forgot to say when they came on the train Saturday evening, that is what attracted us so towards the children, they were so neatly and so cleanly dressed, and their hair was curled, and they were very clean and neat; that was our attraction to those children.

Q. Now state what the condition of those children was when they were returned to the hotel, their health and clothing, or otherwise?

A. Their clothing, of course, was very scanty, because it was, well, 10 or perhaps half-past 10 at night; but their hair was matted, and their faces were dirty, and their clothing, what little they had,

315 was dirty. I think the children had soiled what little clothing they had on; and they were all very, very ill. I had medicine and a doctor for most all of the perhaps 14 little children that came into the Clifton hotel.

Q. In what respect were they ill, if you know?

A. Well, the only way a child has of being ill is perhaps stomach trouble, and they all omitted.

Q. What did they vomit?

A. Well, I could tell you that.

Q. Tell the Court?

A. Well, chili and beans and tortillas, and water-melon, and Mexican beans.

Q. Was there any peculiar odor on the breath of any of these children?

A. Some of them had a very strong odor of whiskey and beer.
Q. What was done with the children during the evening?
A. At the Clifton hotel?
Q. As they came, what did you do with them?
A. I nursed every one of those crying babies the night through until the next morning, with the assistance of two or three friends, Mrs. Wright and Mrs. Pascoe—Mrs. Pascoe was with me all night, and Mrs. Wright and Mrs. Simpson, and several others helped me in and out during the night.
Q. Did you notice anything, any other peculiarity about these children on their return to the hotel—their heads, if you have any recollection?
A. Not that evening.
316 Q. Next morning?
A. No, not the next morning. It was when we came to wash and dress the children for ourselves. We just gave them a general wash the next morning, and didn't notice any peculiarity about their heads until we had really taken them to our homes.
Q. What was the peculiarity, if anything?
A. Well, they were all, their heads were so full of vermin that I really, well, it would take perhaps the whole months to get rid of those vermin.
Q. Now, without leading you, I understand you and those with you took care of them during the night. Was the clothing the same as they had on when they were delivered?
A. Some of them you could tell by the names; there was two or three children that had names on the little boys sailor collars, and some of the little girls on the hem of their dresses, but not more than one or two, I don't think. The rest, some of them didn't have their clothing at all. One child came into the hotel with nothing on whatever excepting she was wrapped in a red calico rag; I think perhaps a couple yards of dirty red calico.
Q. Did you notice any other clothing than that that they had brought with them into Clifton?
A. Some of them, I think, had other clothing on, that perhaps belonged to some of the other children—I mean, Mexican children.
Q. After you had cared for them during the night, what,
317 if anything, was done the next morning?
A. All of our friends came into the hotel, friends that know me in Clifton, and of course, knowing that the children were there, they came to see the children; and of course they were very much infatuated with these little children, and each one of the ladies took one of these children home with them.
Q. That is, the ones that have these children now?
A. Yes, sir.
Q. And have had them ever since?
A. Yes, sir.
Q. You know those people?
A. I know those people.
Q. What is the standing of those people in the town, that have these children now; what kind of people are they?

A. They are good respectable American citizens. I think they are all American citizens; perhaps there is one or two that is of Scotch or foreign ancestry.

Q. All business people there?

A. All good business people in good standing, and perfectly capable and able to take care of these children, and wish to.

Q. Do they have homes of their own?

A. Most of them have their own homes.

Q. Able, you say, to take care of them and educate them?

A. Perfectly.

Q. Have they expressed a willingness to do so?

318 A. They all have and think of them as if they were their very own.

Q. Do you know any one who has any of these children that is not such a person as you would think proper to have the care and custody of these little ones?

A. No, sir.

Q. I will ask you who it was that was present with you at the depot at the time of the arrival of the train. You said your friends were there with you?

A. Did I not state before?

Q. I don't remember?

A. Mrs. Harry Wright, and Mrs. John Parks; and there were several others there.

Q. And yourself were the three on the platform of the private car?

A. Yes, sir; we were the ones on the platform of the private car.

Q. During this association, have you become attached to this child?

A. Yes, sir.

Q. And the child to you?

A. Yes, sir.

Mr. McFarland: It might be well for the child to be shown to the Court and the foster-mother, so that the Court might see for itself the situation and the condition of the child.

319 Mr. Chief Justice Kent: I presume it is that little baby that is put down over there, is it not? (Indicating a baby in the audience.)

Mr. McFarland: Yes, sir.

Mr. Chief Justice Kent: We can see it.

Cross-examination.

By Mr. Ives:

Q. It is very obvious, Mrs. Abrams, that you have become greatly attached to this child. In desiring to keep it, is your affection for it such that if you were satisfied that its welfare would be improved by its being returned back to the asylum, you would be willing to give it back—if you could be satisfied its welfare would be better by its return to the Foundling Hospital?

A. I never could feel that way.

Q. If you did, could you give it back?

A. No, I don't think I could give it back under any circumstances.

By Mr. McFarland:

Q. Do you know Mr. Gatti?
A. Yes, sir.
Q. You know his wife?
A. Yes, sir.
Q. Will you tell the Court the kind of people Mr. Gatti and his wife are?

A. Mr. Gatti is a respectable American citizen, and is
320 thought a great deal of in Clifton; and his wife as well.

Q. Do you know anything about their ability to receive this child and educate it?
A. Yes, sir.
Q. Do you know anything about the moral influence of their home?
A. Mr. Gatti is a Catholic.
Q. Do you know whether they are moral people, or not?
A. Yes, sir; they are.
Q. Intellectual people?
A. Yes, sir.
Q. Do you think that would be a proper place for the care and custody of that child?
A. I do.
Q. And it would have good surroundings and environment with that family?
A. Yes, sir.

Witness excused.

Mrs. Muriel Wright, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. McFarland:

Q. Where do you live?
A. Clifton, Arizona.
Q. How long have you lived there?

A. I have been there five years.

321 Q. Have you one of these little children?
A. I have.
Q. Were you there about October 1st last?
A. I was there on October 1st.
Q. Were you at the depot at the time of the arrival of this special car containing these children?
A. I was.
Q. How did you happen to go to the depot?
A. I was at dinner about six o'clock in the evening, and my husband said he heard a car of children was coming from Texas to be distributed among the Mexicans; and of course I thought a car of little Mexican children was coming in, and I was very curious and wanted to go over and see them.

Q. That was the occasion that brought you to the depot?
A. Yes, sir; the only occasion.
Q. Did you see the car when it arrived?
A. I did.
Q. Did you see what was in the car?
A. I was standing on the platform of the depot when the car came in, and there was a great crowd around the train, of course, as it came to a standstill.
Q. Crowd of who?
A. Mexicans. And Mrs. Sam Abrams, Mrs. Johnnie Parks and myself made our way through this crowd of Mexicans and got upon the platform of this private car; and were very much aston-
322 ished and surprised when we looked through the car.
Q. Is that the wife of the sheriff, Mrs. Parks?
A. Mrs. Johnnie Parks, the deputy sheriff. We looked through this glass door of the private car and saw about 40 little orphan children in this car, and they were little American children. Of course, I had expected to see Mexican children, and I was very much surprised.
Q. What occurred after that?
A. We had been on the platform but a short time when Mr. Swayne came out, and as they passed in and out each time the door was locked; but I said to Mr. Swayne, "Could we go inside and see the children?" And he said we could not, in rather a surly tone; and it wasn't long until the priest came out, and so I said to him, "Are these children to be given away to Mexicans?" And he said, "Certainly not; certainly not." He answered me very emphatically twice. And we were so eager to see these babies that we thought we would just stay on the platform until they all came out; and the priest came out again, and he asked us if we would like to assist them with the children, helping them from the platform of this car to the platform of the depot where they were to be placed in these carriages that were waiting; and we said we would be delighted to do so, because we were anxious all this time to hold these little children; and Mr. Swayne handed them down from the platform to the ladies, and we helped them up onto the platform of the depot; and I
323 said, not only once, but a number of times, "Wouldn't you love to have this little one and that little one;" and Mr. Swayne was there, and I heard him say, "No hurry madam, we will be here two or three days." So the little ones were placed in these carriages, not all of them, but these carriages drove up Chase Creek. Of course, I didn't know where they were going. I thought myself they were going to the Manila hotel; and we went over to the Clifton hotel; and the ladies spoke about it, and we all said we wondered where they were going. Some said perhaps to the Catholic church. I said, "Well, they are such sweet babies, suppose we go up in the morning." I was very anxious, and I had spoken quite often about getting a little child; and I dressed next morning to go, and Mrs. Sam Abrams came to go with me, and Mrs. Tommy Simpson, and some one told us, "Every one of those babies has been given away to Mexicans." I was very much surprised, as I was told the evening before that they would be there several days—because being Ameri-

can babies I expected the American ladies could have one of these little babies if they applied for them. And we talked it over at the hotel next day; and the good citizens of the town thought they had better call an indignation meeting.

Q. That was on Sunday.

A. Yes, sir. And rescue these babies from the Mexican families in which they had been placed. And I was at the hotel when every one of these little babies was brought in, and it was a very cold night—it was stormy—and I stayed there until about two
324 o'clock in the morning, when nearly all these little babies were asleep by that time; but when they brought them in they were very sick.

Q. What proportion of them were sick—how many, if you can estimate it.

A. I would say with the exception of two or three, they were all sick.

Q. How were they sick?

A. Well, they vomitted from coarse food, such as the Mexicans in that part of the country live on.

Q. What was that?

A. Beans and chili, and tortillas, and some of them water-melon; and the odor of beer and whiskey was very strong on some of their little breaths.

Q. How were they clad?

A. Very scantily; in fact, one child came with nothing at all on but a little red rag; and the man that brought it took off his coat and wrapped it around the child when he brought it to the hotel.

Q. What was the condition of these children as to cleanliness?

A. When the children came on the car they were very neatly dressed; all had on little white French dresses, nearly all the little girls; and the little boys had little sailor suits; and they had pretty long curls; and some of the children that night, we had
325 noticed these long curls, and the Mexicans had cut their hair off; they were very scantily clad, when they were brought into the hotel, and very, very filthy.

Q. Did you notice anything peculiar about their hair or heads?

A. Of course, we didn't stop to examine them, that night I noticed one little boy, though, couldn't sleep because he kept scratching his head all night long.

Q. Did you find out afterwards the cause of that irritation in his hair?

A. I did, I found out by the little girl I had myself.

Q. What was it?

A. I say I had a little girl; and I found that her head was filled with vermin.

Q. You have one of these children?

A. I have one of them.

Q. Are you able financially to take care of that child and educate it?

A. We are.

Q. And would do so with the permission of the Court?

A. We certainly would do so; and gladly do so.

Q. Have you become in any way attached to the little one?
A. I certainly have.
Q. And it attached to you?
A. Yes, sir.
Q. Is it a boy or girl?
326 A. It is a girl.
Q. How old?
A. Three years old on the 9th of September—1901, it was born.
Q. Have you any children of your own?
A. I have no children of my own.
Q. How long have you been married?
A. I have been married five years next month.
Q. Do you desire to take this child and raise it as your own?
A. I certainly do.
Q. And will do so if permitted by the Court?
A. I certainly will.
Q. Do you know Mr. Gatti?
A. Yes, sir; I do.
Q. State to the Court, is Mr. Gatti able to take care of and educate this child he has?
A. Mr. Gatti is a business man of Clifton, Arizona, and has no children of his own; and I think he is well able to take care of this child.
Q. What is Mr. Gatti's business?
A. He is in the butcher business.
Q. He was a long time in the employ of the Arizona Copper Company, wasn't he?
A. I couldn't tell you as to that, because I have only lived
327 in Clifton five years myself; so I don't know.
Q. Are they intelligent, moral people?
A. Yes, sir; they are.
Q. You think that would be a good home for the little child?
A. I think it would be a very good home.
Q. And good surroundings?

Cross-examination.

By Mr. IVES:

Q. If you were satisfied that the future welfare and happiness of this child would be improved by your surrendering it, would you be willing to surrender it?
A. I would not.

Mr. WALTER BENNETT: Is it possible, since you have had this child in your control, that you could be convinced that it was for the best interests of the child that it be returned to the New York Foundling hospital?

Petitioner objects to the question. Objection sustained by the Court.

By Mr. MCFARLAND:

Q. Do you know the Mexican people of Clifton in a general way?
A. Yes, sir; in a general way.

Q. What kind of people are they?

A. They are very illiterate people, and they are not a cleanly class of people, and spend nearly all their earnings in drink-

328 ing and gambling. And those that earn anything at all, of course, it is just a mere pittance; not enough to clothe their own children.

Q. Do you know particularly any one of these Mexican women that was assigned a child on the evening of the first of October?

A. You say the Mexican women?

Q. Yes.

A. Well, I know of one that I have heard of, the one that Mrs. Jake Abram's little baby was given to.

Q. You know of her?

A. Yes, sir.

Q. What do you know of her?

A. Well, I know she has been a very bad woman, and she keeps a boarding-house now, and her house is visited by the worst class of people in town; in fact, she boards them; and she had one of these little girls.

Q. Her house, you say, is visited by the worst class of Mexican men or women?

A. Women.

Q. You mean to say it is a rendezvous for that class of people, her house?

A. It certainly is.

By Mr. T. D. BENNETT:

Q. The little child you refer to was Joseph Corcoran?

A. It was.

329 Q. What was her health next day after she was taken from this place, from the Mexican home, after she was left at the hotel?

A. She was very sick. This child came with the whooping cough, and of course she was very ill all the time the Abrams had her; and the evening that she came into the hotel she was singing and was really the liveliest one of all; and there was liquor on this child's breath.

Q. She died subsequently?

A. She died since; yes, sir.

Q. Of pneumonia?

A. Yes, sir; of pneumonia.

Q. And the night she was taken away from the Mexican home, what kind of night was that?

A. It was a cold night.

Q. Were the children dressed by the men who brought them to the hotel—I understand you they were only partly dressed?

A. You say were they dressed by the men?

Q. The men who brought them to the hotel?

A. I don't know whether the men dressed them, or not.

Q. When you say they were dressed, they were practically undressed, were they not?

A. But the men wrapped their coats around those children.
Q. But they were removed late at night and during a heavy rain storm; is that correct?
330 A. Yes, sir.

Witness excused.

Mrs. C. F. PASCOE, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. Where do you reside?
A. Clifton, Arizona.
Q. What is your husband's name?
A. C. F. Pascoe.
Q. What is his business?
A. Undertaking; he has a livery-stable also, at Clifton, Arizona.
Q. How long have you lived there?
A. Over three years; three years and one month the 12th of January.
Q. How long has Mr. Pascoe lived there?
A. He came there a little while before me, in November.
Q. Where were you on the second day of October, when this carload of children came to Clifton?
A. In Clifton.
Q. Were you down to the car when the car came in?
A. Yes, sir.
Q. Who was present besides yourself at the car?
A. You mean of the ladies that have children?
331 Q. Yes, ma'am.
A. Mrs. Sam Abrams.
Q. State whether or not there was a crowd of people gathered around the car?
A. There was quite a crowd; there were both white people and Mexicans.
Q. Did you see these children taken from the car?
A. I saw those that were left in Clifton.
Q. Where were they taken to, if you know?
A. They were put into hacks when they were taken off the car, but where they went from there I don't know.
Q. You didn't see the children distributed to the Mexican families, then?
A. No, sir.
Q. I think you said you were not present at the time of the distribution of these children to the Mexicans?
A. No, sir.
Q. Did you have any conversation with the priest or Mr. Swayne at the time the children were being unloaded?
A. No, sir.
Q. Were you at the hotel when the children were returned to the hotel?

A. Most of them had been gathered up when I arrived at the hotel.

Q. Where were the children when you saw them in the hotel?

332 A. They were on pallets on the floor.

Q. Any other ladies of Clifton there in charge of them or taking care of them?

A. Yes, sir; I was one that stayed all night and helped take care of them; and the little things were very sick too.

Q. What was their condition in reference to their clothing, etc.?

A. Most of them had been put to bed as soon as we could get the clothing off of them. We couldn't take all the clothes off.

Q. What was their condition in reference to cleanliness?

A. Those that I saw seemed to be clean enough, but they were all sick to their stomachs. Of course, they had soiled their garments that way.

Q. They had been vomiting?

A. Yes, sir.

Q. Did you make any observation as to what they had thrown up?

A. The odor of beer was very strong on some of them. I suppose it is tortillas, or whatever the Mexicans call it, a kind of hot-cake that they make.

Q. What was the condition of their hair or their heads?

A. Well, my boy's head when I got him—the little boy here; his head was lousy and full of nits. It took me as much as six weeks to free his head from the lice. Of course, what nits there are

333 in it now, I suppose are dead; there are no lice, anyway.

Q. Have you one of these children?

A. Yes, sir; I have.

Q. Is it a boy or girl?

A. A boy.

Q. What is his age?

A. I didn't get the age.

Q. Was there any ticket attached to this boy when you got it?

A. Just his name on his clothes and in his shoes; that is all I found.

Q. What was his name?

A. Jerome Shanley.

Q. Have you any children of your own?

A. I have none living; I had one that is dead.

Q. You have no children living?

A. No, sir.

Q. Are you and your husband financially able to rear and educate this child?

A. Well able to take care of him; yes, sir.

Q. Do you desire to do so?

A. Yes, sir.

Q. Is it your purpose and intention, if permitted by the Court, to take this child and educate and rear it as your own?

334 A. Yes, sir; and I love him just the same as my own flesh and blood.

Q. Has the child become attached to you?
A. Very much attached to us; yes, sir. The night he was brought in there was a little girl handed him to Mr. Pascoe, and he put up his hands and said, "Papa," and from that time until 2 o'clock in the morning Mr. Pascoe couldn't get him out of his arms. That was about half-past 10 he was brought in.
Q. Have you a proper home for this child?
A. Yes, sir.
Q. And are able and willing to educate it and rear it as your own?
A. Yes, sir.
Q. Is this also the desire of your husband, Mr. Pascoe?
A. Yes, sir.
Q. Do you know Mr. John C. Gatti?
A. Yes, sir; I know him; he and his wife are both well thought of in Clifton, and well-to-do people.
Q. Are they financially able to rear and educate a child?
A. Yes, sir.
Q. Have they children of their own?
A. Not that I know of.
Q. What is Mr. Gatti's business?
A. He is in the butcher business.

335 Cross-examination.

By Mr. IVES:

Q. You have a very great affection for that child?
A. I have.
Q. If you were persuaded and believed that the future welfare and happiness of that child would be improved by your surrendering it up, would you be willing to surrender it up?
A. No, sir; I am not willing to surrender it up.

Respondent objects to the question.
Mr. WALTER BENNETT: We don't think that is a proper question. It asks for an impossible answer, and does not seem to us it is material in this case at all.
Mr. Chief Justice KENT: What is the purpose of that?
Mr. IVES: It is to prove that while the welfare of the child may be, under certain circumstances, an element, the delight that these present foster-mothers take in the child is not an element. I think the question is a very material one.
Mr. Chief Justice KENT: This question has already been asked and answered.
Mr. WALTER BENNETT: Whenever a hypothetical question is put to a witness, it must be reasonable. This is putting an unreasonable hypothesis to the witness.
Mr. Chief Justice KENT: The question may be fair enough; the difficulty is it may not be properly understood always.

(Objection argued to the Court by Counsel. No ruling.
336 The child in the possession of the witness was shown to the Court.)

Witness excused.

Mrs. C. C. REED, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. Where do you reside?
A. Clifton, Arizona.
Q. Your full name?
A. Etta Reed.
Q. Your husband's name?
A. Charles Reed.
Q. What is your husband's business?
A. He is in the furniture business and had a contract for street sprinkling.
Q. How long have you lived in Clifton?
A. A little over three years.
Q. How long has your husband been there?
A. He has been there the same length of time; we came there together.
Q. Have you any children?
A. I have one daughter grown and married.
Q. Is that the only children you have?
A. That is the only child I have living?
337 Q. Were you in Clifton at the time this car load of children came in there?
A. Yes, sir.
Q. Were you down to the car when they came in?
A. I was not.
Q. When did you first see any of the children?
A. On Sunday. I saw two of them in the Mexican home where they were placed.
Q. Which two did you see?
A. I don't know the man's name. I have the tag attached to my affidavit, of the man's name; but I don't know it. I know him—I knew where they were living and I went to see the children.
Q. Have you one of these children?
A. No, sir; I have not. That is not the child I have.
Q. Have you one of the children?
A. Yes, sir; I have.
Q. Look at the document now shown you, and state what it is? (Counsel showing tag to witness.)
A. This is the tag that was on the little boy that my daughter has; it was tacked on to his sailor suit that he had on.

Mr. WALTER BENNETT: We will offer this in evidence.

Q. What is your daughter's name?
A. Mrs. J. E. Horner.

Mr. WALTER BENNETT: This reads: Padua Nunez, Clifton, Arizona. Edward Gibson, born August 7, 1900.

(Tag identified by witness filed as Respondent's Exhibit
338 No. 3.)

Q. Do you know Padua Nunez?

A. I don't, except by sight.
Q. Did you see the child to which that tag was attached?
A. Yes, sir.
Q. In the home of the Mexican to whom it was delivered?
A. Yes, sir.
Q. What was its condition at that time?
A. It had on the same clothes the children came in when it came to Clifton, but they were very dirty.
Q. What kind of a home is it?
A. Well, it is just like all other Mexican homes; it is very rude. I wasn't inside the dwelling; I was just at the outside. It appeared very coarse—they brought the children outside for me to see; but the outside surroundings were very coarse.
Q. What was it built of?
A. Lumber, as well as I remember; it might partly be made of adobe. I can't state just exactly how the house is built, but part of it is lumber.
Q. Do you know whether it has a floor or not?
A. No, sir; I wasn't inside.
Q. Were you at the hotel after these children were brought to the hotel?
A. Yes, sir. There was a few of them already brought in when I got to the hotel.
339 Q. What was the condition of the children as they were brought in?
A. Well, they were partly clad, and some of them very sick; and some of them were almost without clothing. Some of them, the worst ones, had been brought in before I got there, and had been attended to by the ladies.
Q. What did you do, if anything, with reference to the children?
A. I helped to quiet them. One little boy there was very restless, and no one seemed to be able to quiet him. I took him in my arms and walked the floor with him. The main trouble seemed to be his little head.
Q. Which boy was that?
A. That was the one Mrs. Henry Hill has; his first name was Raymond. He had long curls and they were in a mass of tangles.
Q. What was the condition of his head with reference to cleanliness?
A. Of course, I don't know about his head personally; I didn't examine it that night; but I know he was clawing at his little head with both hands constantly. Of course, I was told what was the matter, but I didn't know then. I know from my own what was the matter.
Q. Did you afterwards have one of these children?
A. Yes, sir; I took one home with me that night.
340 Q. Boy or girl?
A. Boy.
Q. And his name?
A. Joseph Ryan.

Q. What was the condition of these children with reference to being sick, or otherwise?

A. Some of them were very sick; most of them.

Q. Did they vomit and throw up?

A. Yes, sir.

Q. Could you tell from their vomiting what they had been eating?

A. They had been eating coarse Mexican food—you all know what that is: chilis, tortillas, and frijoles; and some of them threw up beer.

Q. You took one of the children home with you?

A. Yes, sir.

Q. And you have him yet?

A. Yes, sir.

Q. What is his age?

A. Three years last September, the tag said.

Q. Have you got him now?

A. Yes, sir.

Q. Where is he?

A. He is right back here.

Mr. WALTER BENNETT: We would like to have him exhibited to the Court. (Child shown to the Court.)

341 Q. Are you financially able to take care of this child?

A. Yes, sir.

Q. Is it your desire to do so?

A. It certainly is.

Q. Is it likewise the desire of your husband to do so?

A. Yes, sir.

Q. Is it your purpose and intention if permitted by the Court, to rear this child as your own?

A. As our own.

Q. Have you a proper and suitable home?

A. Where we live now we are living in a rented house, because we haven't been permanently located here and didn't desire to build a house until we were settled whether we were going to stay, or not, in Clifton.

Q. But you are in business in Clifton?

A. Yes, sir.

Q. And have a suitable home for the reception of this child?

A. Yes, sir.

Q. Has the child become attached to you?

A. Yes, sir; very much.

Q. Are you attached to the child?

A. I couldn't tell you how much; just the same as if he was my own.

342 Cross-examination.

By Mr. IVES:

Q. If you believed that the future happiness of that child would be improved if you were to surrender it, would you be willing to surrender it?

Respondent objects to the question, for this reason, if for no other: it is a hypothetical question, and the hypothesis represents an impossible situation.

A. I would like to answer that question in my own way.

Mr. Chief Justice KENT: You may.

A. I don't think a child that is brought from a home where you comb large lice out of its head, could be better taken care of in a home than I would take care of it.

Q. That is not the question. I didn't ask you whether you would be willing to surrender it to that Mexican family, but I asked you, is your affection for that child so great that if you believed its future happiness would be improved by your surrendering it to somebody, would you be willing to surrender it?

Respondent objects to the question, as contradictory.

Mr. WALTER BENNETT: The question is: Is your affection for that child so great that you think its condition would be better by surrendering it, would you surrender it?

A. I don't think a mother's love could sacrifice her child, even for its own welfare; and that is the love I hold for that boy.

343 Q. What is your daughter's name?

A. Cora Harkis. (?)

Q. Has she any children of her own?

A. She has one baby.

Q. How old is it?

A. A year old.

Q. How long has she been married?

A. Going on three years.

Q. Her husband is living?

A. Yes, sir.

Witness excused.

Mrs. LOUISA GATTI, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. MCFARLAND:

Q. Where do you live?

A. Clifton, Arizona.

Q. How long have you lived there?

A. Oh, I guess about six or seven years; something like that.

Q. What is your husband's name?

A. John C. Gatti.

Q. What is his business?

A. Butcher.

Q. Have you one of these little children?

A. I have, a little boy.

344 Q. Were you at the depot on the evening of the arrival of those little children?

A. Yes, sir; I was.

Q. What was the occasion of your going down there?

A. Well, I was there——

Petitioner objects to the question.

Mr. Ives: That is the same thing. There is no denial of it. Why should we consume time by this mass of cumulative testimony? We are not going to rebut it.

Mr. Chief Justice Kent: With respect to the circumstances you have already evidence in, if it is not going to be contradicted, it is not necessary.

Q. You were there the evening of the arrival of that car?

A. Yes, sir.

Q. Containing those little children?

A. Yes, sir. There was a large crowd at the depot; and I thought to myself, "I better get where I could see the babies good." So the car pulled up a little ahead, and I goes to work and climbs the box car—not exactly a box car, but a flat car that you load lumber on—and gets a peak at the children, and jumps down and goes up to the butcher shop and tells Mr. Gatti, "Oh, but there is some lovely children in that car over there." From there I goes up to the little house where the father stays, on one side of the church; and when I was going up there I saw a large crowd there waiting; And I
345 knocks at the door and a gentleman says "Come in;" and there was a gentleman in there they call Lewis—he is a machine man.

Q. What does he do?

A. He uses a Singing machine.

Q. Has he any connection with the church?

A. Yes, sir.

Q. What?

A. I couldn't tell you what it is. And there was also a Mexican in there what they call Sib—what is other name is I don't know. I says to this Mr. Lewis, I says, "I would like to have one of these babies." I says, "I am not a Catholic, but," I says, "my husband is a Catholic; and also his father, my father-in-law." "Well," he says, "I'll see for you if we can't get you one." "Well," he says, "take a seat." I refused it and sat on the windowsill.

Q. That was the Mexican you was talking to?

A. No, sir; that was Lewis. I sat in the windowsill, and sat there until the sisters and the children and father and all of them came. Pretty soon here comes in the father and the sisters, and I saw a whole lot of Mexicans packing in the babies. I steps to one side, and I says to the father, I says, "I would like to have one of these babies." I says, "I am not a Catholic myself, but," I says, "my husband is, and also is my father-in-law." "Well," he says, "I'll see if I can't get you one." That was all settled there. Well, pretty
346 soon here comes in the Mexican women. As they came in they would hand the father a paper. Father would look at it, and he would look at his paper, then they would examine Mr. Swayne's paper; then he would examine his paper well; then they would go around and look at the tags of the children, to see if they could find the number. Pretty soon they did find—I don't remember now whether it was a boy or girl; anyway, they brought the children up in front of them, and the sisters looked at the lady, this

Mexican woman, whatever you call her; and she says, "No, father;" she says, "this woman is a little bit too black for that, for the color of this baby." Then the father and Mr. Swayne persuaded her to give it, and she did.

Q. Persuaded the sister to withdraw her objection?

A. To give this baby to the Mexican woman; so she did.

Q. State the facts, what occurred when they came back with the baby?

A. When they came back with the baby?

Q. You said they went over and found the number and came back?

A. They came back with the baby and put it in front, and the sister looked at the woman good, and looked at the baby—threw her eyes over the baby; and she says, "No, father, this woman is a little too black for the color of the baby."

Q. What was done then?

A. So the father and Mr. Swayne was talking and talking,
347 so they got her to give the baby to this Mexican woman; so she did.

Q. The Mexican woman got the baby?

A. Yes, sir.

Q. That the sister objected to her having?

A. Yes, sir.

Q. Did you see any more children delivered there that night?

A. I seen about 13 or 14 while I was there.

Q. Was there any objection to any of them by anybody except the one you have mentioned?

A. Well, the sister didn't like the color of their faces very much, but they gave the babies to the Mexicans just the same.

Q. The priest and the agent?

A. Yes, sir; all of them.

Q. Did you have any conversation with the agent or the priest about getting a baby that evening?

A. With the father I did.

Q. What did you say to him, and what did he say to you?

A. He said he would try to get me one. Now while I was staying there waiting to see if I could get a baby, here steps in Mr. Gatti, my husband, and he come over towards me, and he says, "Old lady, I want some supper." "Why," I says, "here John, here's the key. Go home and get your supper yourself. It's all ready." He just told me, "No, come on." I says, "No, I want a baby." As I jumped up the father caught my arm and he says, "No, don't go yet;
348 I am going to give you a baby." "Well," I says, "I got to go." At that time Mr. Gatti and the father commenced to talk French. Of course, what they said I didn't know. Well, they talked French a few minutes; then I kind of started out of the door, and the father caught hold of my arm and he says, "No, no; don't you go; I- going to give you a baby." I says, "I've got to go to- and get my husband some supper." So that is the end of it.

Q. So you didn't get the baby?

A. No, I didn't get any; they were all given to the Mexicans.

Q. When did you next see those children, if you saw them after that. I will ask you what kind of Mexican women, if you know, were those who presented these tags?

A. They were dirty faces, and wore black shawls over them and they had ragged dresses on.

Q. Did every one that applied have a card?

A. They had a kind of letter on brown paper.

Q. That was handed to the priest?

A. Yes, sir; and the priest looked at her paper first, then looked at his, then looked at Mr. Swayne's paper; then he would go around and look at the tags on the little children—the little children had tags hanging down with numbers on.

Q. When they found that particular number they gave that baby to that particular applicant?

349 A. Yes, sir.

Q. When did you see those children again, if you saw them afterwards?

A. I happened to see a little boy on Sunday morning. He happened to be coming on the street and my sister happened to see me, and she says, "Oh, Liz, come here; here is a Mexican woman over here got one of those little babies." I says, "Come on, let's go and see the poor little thing;" and we went over to see it; but it looked like its little heart was broken.

Q. Did you see them at the hotel?

A. The only time I seen them was that Monday morning when I got my little boy.

Q. You didn't see the little children when they were taken to the hotel on Sunday evening?

A. No, sir.

Q. What was the condition of the child when you got it at the time you got it?

A. Oh, my boy was all right; the only thing his face was dirty, and he had a pretty dirty dress on.

Q. He was well, as far as that is concerned?

A. Yes, sir.

Q. Are you and your husband financially able to take care of this child?

A. We are.

Q. And willing to do so?

350 A. Yes, sir.

Q. Have you become attached to it?

A. I have surely, sir.

Q. And the child to you?

A. Yes, sir.

Q. Have you a home there in Clifton?

A. We have, sir.

Q. In Clifton?

A. Yes, sir

Q. Which one of these children it is you have?

A. The little boy right over there. (Pointing to a baby in the audience, which was then exhibited to the Court.)

Q. You say this is a boy?
A. Yes, sir.
Q. Do you know these Mexican people who got these children—do you know anything of them personally?
A. No, sir. There are so many Mexican women around there I don't know one from the other.
Q. You don't know any of them personally?
A. No, sir.
Q. Do you know the Mexican people up there in a general way?
A. Well, they are Indians; they are not real Mexicans.

351 Cross-examination.

By Mr. IVES:

Q. You know the priest up there, do you; Father Mandin?
A. The one that stops up there all the time?
Q. This priest that gave these children?
A. I don't know him; no, sir. That was the first night I ever met the gentleman.
Q. How did he talk, in very broken English?
A. Well, he understood me well, but I couldn't understand him very well. I had to get right close up to him.
Q. He was evidently a foreigner?
A. I guess he pretended to be.
Q. He spoke French to Mr. Gatti?
A. Yes, sir.
Q. Mr. Gatti speaks French?
A. Yes, sir.
Q. How long had he been there?
A. This father?
Q. Yes?
A. I couldn't tell you that; I was in California at the time this father came over there.
Q. Then he couldn't have been there more than a few months?
A. I shouldn't think so.
Q. Now, you say you have become very much attached to this child?
352 A. Yes, sir; with all my heart, sir.
Q. If you believe that his future happiness would be improved by your giving him up, would you be willing to do so?
A. No, sir; I wouldn't.

Respondent objects to the question, on the same ground as that urged to the same question before. Same ruling by the Court.

By Mr. MCFARLAND:

Q. When these children were being given away by the priest and the agent at the church on Sunday night, what, if anything, was said by——
A. You mean Saturday night.
Q. Yes. What, if anything, was said by the priest or agent at

the time the children were given to the applicant or applicants—was anything said by the priest?

A. They talked so low I didn't hear what they said.

Q. You didn't hear anything?

A. No, I didn't hear what they said.

Q. How close were you to them?

A. About from here to you. (About 10 to 15 feet.)

Q. You could have heard an ordinary conversation?

A. You could have seen the mouth work, but couldn't hear what they were saying.

Mr. Justice DAVIS: Do you have the boy Norton?

A. William Norton; yes, sir.

Adjournment taken until 9.30 A. M. tomorrow, January
353 17, 1905.

TUESDAY, *January* 17, 1905—9.30 a. m.

H. B. RICE, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. MCFARLAND:

Q. Give your full name?

A. H. B. Rice.

Q. Where do you live?

A. Morenci, Arizona.

Q. Your business?

A. I am in the mechanical department of the Detroit Copper Mining Company.

Q. Do you hold any official position in this Territory?

A. At present a member of the legislative council.

Q. Were you in Morenci on Sunday, October 2nd last?

A. I don't remember positive that date.

Q. I will ask you this question: Were you at the time of the arrival of these little children in Morenci, there?

A. Yes, sir; I was there.

Q. Did you have a conversation with Mr. Swayne at the time of their arrival?

A. Yes, sir.

Q. Will you state to the Court what that conversation was—who was present.

354 A. Dr. Tuttle, the company physician for the Detroit Copper Mining Company, and a number; I remember Mr. Lynch, and probably 15 or 20 bystanders standing around as we concluded the talk.

Q. What part of town was this?

A. In the railroad yard near the hotel in Morenci.

Q. State to the Court the conversation, now, between you and the agent?

A. I asked him what they were doing with the children there; and he replied that they were distributing them to families in town. I asked him if he thought it was the proper thing to give these children to such a class of people as they had done—the Mexican people

there. He replied that, yes, he thought so; he proposed to try it anyway. Those were about the words he used. I asked him who he represented, and he stated, I think it was the American Foundling asylum, or something of that kind.

Q. You say "try it," or "try the experiment?"

Petitioner objects to the question, as leading.

Q. Was anything further said, other than you have stated.

A. He stated that they had distributed a number of thousands—I forget how many thousand, but a great many thousand children, that they had placed in homes throughout the country.

Q. Did he say he knew the people in whose homes these children had been placed?

Petitioner objects to the question, as leading.

355 Mr. Chief Justice KENT: The question should be framed so it will not be so leading in form.

Q. What did he say in respect to the people in whose homes these children had been placed?

A. Nothing more than that. In answer to the question I asked him, if he thought it was the proper class of people, he stated that he did. He stated that he proposed to try it anyway, or to try it.

Q. Did he know at that time the class of people that these children had been placed with?

Petitioner objects to the question, unless the witness knows whether he knew it.

Mr. Chief Justice KENT: If the witness knows he may answer.

A. I couldn't state positively that he knew; but a person wouldn't have to walk up street very far to know what the class of people were that had the children; and I think any one could have known the class of people by looking at them.

Q. Were they there, many of them, present at that time?

A. Yes, sir; they were around there. Most of them were at the Catholic church, too, quite a large crowd.

Q. Did they have the children then?

A. The children had already been distributed, probably 15 or 18 of them; and the Mexicans had taken them to their homes, and they were scattered through the town. But with Mr. Swayne and the children there were six children who the Mexicans hadn't
356 called for. They were taking them back to Clifton.

Cross-examination.

By Mr. IVES:

Q. When you say the Mexicans hadn't called for them, are you certain that the Mexicans hadn't called for them, or that they had been refused to the Mexicans who had called for them?

A. That was simply talk; I don't know.

Q. You have no knowledge that the Mexicans hadn't called for them?

A. No, sir; I couldn't state as to that.

Q. After that were you present at a conversation between Mr. Mills and perhaps some others, and the sisters, in which Mr. Mills explained to them the relationship between the Mexicans and white people in this Territory?

A. No, sir; I wasn't present.

Witness excused.

T. J. SIMPSON, called as a witness in behalf of the respondents, and duly sworn, testified as follows:

By Mr. MCFARLAND:

Q. Where do you live?

A. At Clifton, Arizona.

Q. What is your business?

A. Locomotive engineer.

Q. For what company?

357 A. The A. & N. M. Railway.

Q. How long have you been with that company?

A. About seventeen years.

Q. You have one of these little foundlings?

A. Yes, sir.

Q. Were you in Clifton on the arrival of these children?

A. I was.

Q. Were you at the depot?

A. Yes sir.

Q. On the following day, on Sunday, did you go to Morenci?

A. Yes sir.

Q. What time?

A. It was about one o'clock.

Q. Anyone go with you?

A. Yes sir, Jeff Dunagan.

Q. What was the object of that visit to Morenci?

A. Well, we noticed how these children had been distributed in Clifton, and there was five—we got up a party, there was five of us got a buggy *the* night to go up and see what was going on; what they were doing distributing these children. We noticed the Mexicans walking around with them and everything—how they had been placed the night before, and some gave away that morning. I volunteered myself to do it with him.

Q. Go up to see the agent?

A. Yes sir, and the Father.

358 Q. What did you say your purpose was going up to see the agent and the Father?

A. To see how they had distributed those children what their object was in distributing them among Mexicans.

Q. Who went with you?

A. Jeff Dunagan.

Q. Anyone else?

A. That was all there was; five of us met.

Q. I am asking just who went to Morenci?

A. That is all.

Q. What time did you reach Morenci?
A. We left there about—I presume it was about eleven o'clock.
Q. When you left Clifton?
A. No, we left Clifton about 12:30, or one o'clock in the afternoon.
Q. What time did you reach Morenci?
A. It was about eleven o'clock, when we left there.
Q. I mean how long was it after you left Clifton before you reached Morenci, how long did it take you to go from Clifton to Morenci?
A. Oh, about an hour or an hour and a quarter.
Q. Then you reached Morenci about an hour after you left Clifton?
A. Yes sir.
359 Q. Who did you first go to see when you reached Morenci?
A. Mr. Mills.
Q. Who is Mr. Mills?
A. The superintendent of the Detroit Copper Company.
Q. Was Mr. Dunagan with you then?
A. Yes sir.
Q. Where did you and Mr. Dunagan and Mr. Mills go if you all three went together?
A. We went up into the D. C. Hotel; and the agent and the Father was up there—we had been informed they were up in the hotel. So we could not find them for a little while, and we found the sisters, and they said he was in his room, and they would look for him; and directly we found him, and asked him for an explanation.
Q. Where did you find him?
A. He came out of a room as we were looking for him.
Q. His room?
A. No, it wasn't his room, I think it was a room, but it wasn't his room, because we went to his room. So Mr. Mills and myself and Mr. Dunagan went into the room, and talked with him quite a while, and talked with the Father quite a while.
Q. What did you say to the agent in reference to the conditions in Clifton?
A. We told him the people was kind of worked up over the way the children had been placed, and that wouldn't do. We tried
360 to explain everything to him; and he got kind of angry, Mr. Swayne did; and he says, "Well, I'll tell you." He says, "I know my business, and you people can't tell me anything about it." He says, "I have been agent for the Foundling Hospital," I think he said thirty-five years, and had placed some thirty-thousand children. We told him it wasn't right placing them with the Mexicans that way, the lowest class in the whole community, so he says he wouldn't let us dictate to him at all and tell him what to do. So we went to work and tried to explain everything, and he says, "I know my business. The children are placed, and will stay placed right where they are."
Q. After you got that answer from Mr. Swayne——
The COURT: What children are you referring to, the children in Clifton or Morenci?

A. The children in Clifton.

Q. After Mr. Swayne declined, as you say, to take any action in reference to the Clifton children, did you communicate with anyone?,

A. I went down and telephoned to Clifton, to Mr. Abrams right away. I says, "He's refused to take any action in it." So that must have been about, I judge it was about three o'clock or half past three in the afternoon. So they went and had another meeting, you know.

By Mr. IVES:

Q. Who?

361 A. Jacob Abrams.

Q. You were not present at that?

A. No sir.

By Mr. MCFARLAND:

Q. Just what you know yourself, personally. Was any action taken by the citizens of Clifton until after you had communicated the refusal of Mr. Swayne to take any action in this matter?

A. None whatever.

Q. And all that was done in Clifton, or said in Clifton was after his refusal had been communicated to them?

A. Oh, yes.

Q. Were you in the hotel any large part of the time you were in Morenci that day?

A. Yes sir, quite a bit. I was in the hotel or down in the telephone office all the time.

Q. You and Mr. Mills and Mr. Dunagan were together all the time?

A. Most of the time; only when I went down to telephone. Dunagan went down to the telephone once or twice. We were there together, for must be four hours.

Q. Did you hear any threats of violence towards Mr. Swayne that day in Morenci?

A. No.

Q. Was there any considerable crowd around the hotel?

362 A. Well, there was, there must have been about three hundred people I think.

Q. What class of people, Mexicans or white people?

A. Most of them was white people, I know the fore part, until it must have been eight o'clock when the Mexicans came in.

Q. Four o'clock in the afternoon?

A. No, about seven o'clock.

Q. What time did you return to Clifton?

A. I think it was about—what time we left Morenci?

Q. Yes sir.

A. Oh, about eleven o'clock.

Mr. IVES: At night?

A. Yes sir.

By Mr. McFARLAND:

Q. Then you got down to Clifton about an hour after that?
A. About twelve or twelve thirty.
Q. When you returned to Clifton, where did you go?
A. We went right to the Clifton hotel first, and then went across to the library.
Q. Had the children been gathered at the hotel when you returned?
A. They had.
Q. They were all there?
A. (No answer.)
363 Q. Who went back with you to Clifton?
A. Why, the Father, Jeff Dunagan and Mr. Swayne.
Q. How did you go down?
A. We went down in a carriage.
Q. You have one of these little children?
A. Yes sir.
Q. A boy or a girl?
A. A girl.
Q. How old?
A. She's about three years old.
Q. Are you financially able to take care of and educate this little one?
A. Yes sir, I think so.
Q. Is it your desire to do so?
A. It is.
Q. The desire of your wife?
A. It is.
Q. Have you any children?
A. No sir.
Q. None of your own?
A. Mine are all dead. I have two, but they died.
Q. Have you formed any affection for this child?
A. I have.
Q. And your wife?
A. She has.
364 Q. Is that seemingly reciprocated by the child?
A. Oh yes; yes sir.
Q. Do you know these other people that have these children?
A. Yes sir, I know very nearly all of them personally.
Q. What kind of people are they?
A. The very lowest of the low.
Q. I mean the people that have the children now.
A. They are good people, all white people, Americans.
Q. All able to take care of the children?
A. They are.
Q. Good responsible, moral people?
A. They are.
Q. Engaged in business in Clifton?
A. Some of them are in business, and some of them mechanics.
Q. But all respectable, moral people?

A. They are.

Q. And financially able to take care of these little children, and raise them?

A. They are.

Q. Is the little child you have in the court room?

A. No sir, I had to take it out. It got so nervous I had to take it out. It is outside.

Mr. Chief Justice DAVIS: What is its name?

365 A. Anna Louise Daugherty.

Q. I will ask you if you know the Mexican people at Clifton?

A. Why yes, I think I know them about as well as anybody; I have lived there so long.

Q. Generally, what kind of people are they?

A. Well, it's a mining camp, and we have the renegades of Mexico and of Arizona; that is, down in Guaymas and about there, what we have got to contend with.

Q. That is the class of Mexicans in Clifton?

A. Yes sir.

Q. Do you know the particular ones to whom these children were assigned?

A. I know most of them personally, yes sir.

Q. Do you know a Mexican by the name of Mendoza?

A. Yes sir.

Q. Do you know what he does?

A. Well I can't tell exactly, because I don't think he works much at all.

Q. Do you know his wife?

A. I ain't personally acquainted with her, only I see her once in a while; that way, see her when she goes out.

Q. Do you know what she does?

A. No sir, I can't say.

Q. Do you know whether they have a home there or not?

A. I can't say for sure whether they own the home or not.

366 They have a place there; but I cannot tell whether they own it.

Q. What kind of a man is he?

A. I'll tell you. I don't pay much attention to them, you know, the Mexican class of people; but it is just this way: you see they work around there, and all get very little salary, and I can't tell that way what kind of a man he is, or much about him.

Q. Do the salaries of the majority of them amount to much more than is necessary to sustain them?

A. No sir, the salary of the Mexican class of people is about two dollars a day, some of them two and a half, and very few of them gets three.

Q. Is that about the cost of living in the ordinary Mexican family?

A. Well, they are very extravagant in the dry goods department.

The petitioner objects to the form of question as leading and suggestive.

The COURT: It undoubtedly is.

Q. Do you know a Mexican by the name of Nunez?
A. I don't believe I do.
Q. Do you know Lacona?
A. No sir I don't.
Q. Gonzalez?
367 A. Yes sir, I know him.
Q. What kind is he?
A. I'll tell you, they all live in those little shacks about the size of 8 x 6, or 8 x 10, and most of them have no floor in them at all, no floor in the house at all.
Q. You just know them as you see them, you don't know very much about them personally?
A. No I don't.
Q. Just casual acquaintance; that's your knowledge.
A. Yes sir. Would I be allowed to tell what I seen that morning?
Q. What morning?
A. Sunday morning.
Mr. IVES: Where?
A. In Clifton.

By Mr. MCFARLAND:

Q. About the children, was it?
A. Yes sir.
Q. Yes sir.
A. I seen a Mexican going along with one; it must have been ten o'clock, with a bottle of whiskey in one hand, and a little child in the other, and it was crying, and wanted to go home. That was what started me so quick to rescue; and the child wanted to go home, and he was staggering along with the bottle of whiskey, and
368 wouldn't go home. That was one thing that started me so quick.
Q. Is that child here?
A. I can't tell. You see they are dressed a whole lot different now than they were then.
Q. Your child is here in the house?
A. Yes sir.
Q. Is it in here now?
A. No, my wife got nervous and took it out.

By Chief Justice KENT:

Q. Do you know whether these families to whom these children were given, whether they had children of their own or not?
A. The Mexicans, yes sir they did.
Q. All of them?
A. No, not all of them, but some of them had as many as four. Could I tell what happened in Morenci?

By Mr. MCFARLAND:

Q. Yes sir.
A. I was talking when we were in Morenci, me and Mr. Dunagan

and Mills was talking to Sister Anna, and I asked her, I says, "Sister, didn't you know these people was very dark?" And she said she did. "Well," I says, "Why didn't you stop this before this?" And she told me, and Mr. Mills and Mr. Dunagan was all present, that she was helpless, it was the Father, she said, she couldn't do it; she was under the Father.

369 Cross-examination by Mr. IVES:

Q. In Clifton, when you saw this little child with this drunken Mexican with the bottle of whiskey, you naturally were very indignant.

A. No, I tell you I think I had a pretty cool head the whole time.

Q. At the same time, you were stirred up about it?

A. I was to a certain extent, yes sir.

Q. I am not intimating that you used any violence. Now when you went up to Morenci and saw Mr. Swayne and all of them, in explaining these facts, you talked very earnestly to them, did you not?

A. No sir; we begged them, Mr. Mills begged if he couldn't do something; Mr. Mills is a very sensible man, and can see quite a ways; don't stop at anything, and he explained and told them these children had been placed where they was placed with the lowest of the low of the Mexicans, and he told them himself, Mr. Swayne, that the Mexicans when they went home, didn't really have a bed to sleep in; that is, one or two of them that was getting two dollars a day; and he said furthermore there was five or six of them would stop in the same room in the same house, and he said it was a disgrace to the American people, placing these children there. And Mr. Swayne gets up, and told us before Mr. Mills that he really was sorry that he was an American citizen. So then you know it would make a person feel kind of bad when a person talked that way; so we
370 asked him to come down and make an explanation before the people, or do something, before that the people, you know, talked to him how this occurred, don't you see; and I goes down right along there when he said that he knew his business, the children was placed and would stay placed where they were at, I goes down and telephones to Clifton, and that was when they began to gather those children in.

Q. Was not your purpose, going up there with Mr. Dunagan, to bring Mr. Swayne and the priest back to Clifton?

A. Yes sir, for an explanation.

Q. Then when you said in your direct examination that your purpose of going was to see the agent and the Father, and ascertain what their object was, that was not your entire purpose?

A. It was our entire purpose to see the agent and the Father, and see what steps they were going to take.

Q. As a matter of fact, before you left there, hadn't the people wanted Dunagan to go up and arrest them and bring them back to Clifton?

A. Didn't have them in any arrest, and they didn't have no warrant.

Q. Didn't they want him to?

A. I don't know as they wanted to arrest him; they wanted him to come back and give an explanation.

Q. Your purpose of going up there was not so much to see and talk with Swayne as it was to bring him back to Clifton?

371 A. To know—the people told us there, they says, no, no, they wouldn't leave him go at all without an explanation right there the way the thing had been going on.

Q. At Clifton?

A. At Morenci.

Q. I mean the people at Clifton; you went at whose instance? You hadn't seen the people at Morenci when you were leaving Clifton?

A. Oh no.

Q. And when you left Clifton, your main object was to bring the agent and priest back to Clifton.

A. To be sure; to explain this matter.

Q. That was your purpose, to bring them back to Clifton?

A. Yes sir.

Q. And naturally when you saw Mr. Swayne, you communicated with him, did you not; that you wanted him to go back to Clifton?

A. We did.

Q. You testified you knew a great many of these Mexican women. Do you know Roja Guerra?

A. No sir, I don't believe I know her. I don't know the names as much as I do their faces. I have been working with them.

Q. This is a woman about fifty years of age and a widow.

A. Perhaps.

Q. She has three grown sons and two grown daughters.

372 A. I could not tell exactly the lady's name, because I don't believe she is married, that had my child. She is about sixty or seventy years old herself, and she is very large.

Q. Don't you know, as a matter of fact, that she owns seventeen rooms?

A. No I don't. If it is the one that owned mine, she only owns a little shack about the size——

Respondent objects to the question in regard to this woman, as she is not upon the list at all as one of those who had the children.

Chief Justice KENT: If that is true, it would hardly seem to be relevant.

Mr. TOM BENNETT: That list prepared in New York had some of the names misspelled, but this is one of the women that had one of those children; that is unquestionably so.

Mr. Chief Justice KENT: That list, the first list, wasn't from the records of the hospital.

Mr. WALTER BENNETT: Not from the child records of the hospital, but from other records in the hospital.

Mr. Chief Justice KENT: We understand it to be substantially correct, but if it should be true there is some child with this woman, we think it would be competent.

373 Mr. IVES: The name here on this list is Garcia, not Guerra.

Q. Did you know one of these children in Clifton, a Marie Mack?

A. A child by that name?

Q. It is the child now in the custody of John C. Tyler.

A. No sir, I don't. I know pretty near right where the place was he came from.

Q. Do you know what the character of the Mexican house is that child was in?

A. No sir, I don't, and couldn't say. It was up Chase Creek there—there isn't but very few good houses up there.

Q. Do you know a Mexican woman, Angela Flores?

A. I do.

Q. Do you know her husband, John Maxwell?

A. I have seen him; I am not personally acquainted with him.

Q. Do you know whether or not he earned three dollars a day at the Shannon Copper Company?

A. I couldn't say whether he does or not.

Q. Do you know anything about her home?

A. Well, she has got a small house there.

Q. Isn't it a good, clean home?

A. Well, no.

Q. Do you know whether it is or not?

374 A. I have seen the front door.

Q. Ever been in it?

A. It don't look clean from the outside and that way.

Q. What kind of a house is it?

A. It is a plank house.

Q. Frame house?

A. Yes sir.

Q. It is not an abode house?

A. No sir; it doesn't look very clean to me.

Witness excused.

NEVILLE LEGGATT, recalled as a witness on behalf of the respondents, testified as follows:

Examined by Mr. MCFARLAND:

Q. You were one of the committee appointed to rescue these children from the Mexicans?

A. Yes, sir; I was.

Q. How was that work apportioned, do you know? Was it all to one committee or to several?

A. No, sir; there were twenty-five.

Petitioner objects to the testimony as having been gone over thoroughly.

By Mr. IVES: There is no contradiction about it. In the testimony on their side and on our side it is the same, and why waste time with it?

375 By Mr. WALTER BENNETT: The testimony of this witness was objected to on the ground that it was not cross examina-

tion when he was on the stand before. We now desire to proceed with that part of the testimony which we were not permitted to proceed with on cross examination.

By Mr. McFARLAND: This is merely a preliminary question.

By Mr. Chief Justice KENT: He may answer it.

A. There was twenty-five of us appointed and myself; and fifteen went to North Clifton and across the river, and the balance went up Chase Creek. I know nothing of those who went up Chase Creek. All that I knew were the ones that went to North Clifton and two across the river.

Q. Who was with you?

A. Mr. Riordan, Mr. Bradley, George Fraser, Tom Horner or Frank Horner—I do not know which.

Q. Where did you go first?

A. First to Alvidras House. We got two children there.

Q. What kind of a house does she live in?

A. Adobe house, sir.

Q. What kind of a floor?

A. Adobe floor.

Q. How many rooms?

A. Three rooms.

Q. All adobe?

A. Yes, sir.

376 Q. What is her given name, do you know?

A. No, sir.

Q. Margarita?

A. I cannot tell you. All I know is Alvidras. That is all I know

Q. How many children did you get there?

A. Two of them.

Q. Was there more than one family occupied that house?

A. There is sometimes. They have these wood men coming in there. They stay there for a night sometimes, and a day two for a time, but just supposed to be herself and husband and one or two men there. I believe that they call them "Cousins" or something of that kind.

Q. Any furniture in that house?

A. Oh, just got about enough furniture to keep themselves going. A bed and a couple of chairs and a table. I have never been through the house to see it. Just what I have seen from the outside.

Q. What does he do?

A. Goes into the country and gets wood—brings in a load of wood about once a week.

Q. Do you know her?

A. Yes, sir.

Q. Do you know her reputation?

A. Yes, sir; it is not very savory. That is all I know.

377 It has not been. I do not know what she is now.

Q. Is she married to this man she lives with?

A. I believe she is, yes, sir.

Q. Where do you go next?

A. Next to Lee Windom.

Q. Do you know him?
A. Yes, sir.
Q. What kind of a man is he?
A. He is a man that has not got a very good reputation about Clifton.
Q. In what respect?
A. Morally and every way.
Q. Does he drink?
A. Yes, sir.
Q. Gamble?
A. I do not know. I cannot tell you that.
Q. Do you know his wife?
A. Yes, sir.
Q. Windom is a white man?
A. Yes, sir.
Q. You know his wife?
A. Yes, sir.
Q. What is she?
A. Mexican.
Q. Does she talk English?
378 A. No.
Q. Do you know her reputation?
A. Yes, sir.
Q. What is that?
A. Until within the last—a little over a year—a year and three months I may say she was a prostitute, and he lived with her five or six years and married her within a year and three months, or a year and four months; just before I started on the wagon I remember that she got married.
Q. What kind of a house do they live in?
A. Adobe house.
Q. How many rooms?
A. Two rooms.
Q. Furnished about like the other?
A. Yes, sir; they have a couple of chairs and a bed.
Q. How many children did you get there?
A. One.
Q. Do you know the name of it?
A. No, sir.
Q. Boy or girl?
A. I think it was if I am not mistaken—I don't know whether it was a boy or a girl.
Q. Where did you go then?
A. To Cornelia Chacon from there.
Q. What kind of people are they?
379 A. I always thought Mrs. Chacon—she was the one that talked English; as I made the remark to Mr. Bennett when we were there, I think they were about the best people they had been assigned to.
Q. Do you know him?
A. Yes, sir.

Q. What kind of a Mexican is he?

A. He gets on spells every once in a while and gets drunk and things of that kind. When he works he gets pretty fair wages; I think about three dollars a day—skimmet or something.

Q. Is he violent when he is drunk?

A. The only time I seen him was when he was going home. I cannot say. I only saw him on the streets.

Q. That is three; Did you go to any other house?

A. Yes, sir; that was the last house I went to; that was José Bonillas.

Q. What do you know about him?

A. He is a drunkard. She was nothing but a prostitute. I have seen them at times when I used to go around there at 5 o'clock in the morning on the butcher wagon. I have seen a whole crowd in the room. There was there a lot of other women singing, and bottles of wine there.

Q. How many did you get there?

A. Just one. Mr. High's little boy.

Q. Have they any children?

380 A. Yes, sir; she has one.

Q. Has she any children of her own?

A. Yes, sir; one. That is the one we found laying on the floor on a skin.

Q. Do you know personally any other Mexican families assigned children by the agent?

A. Yes, sir; This Mrs. Maxwell who lives across the river.

Q. What do you know about him?

A. I know he married a prostitute himself. He is a nice enough fellow himself, but he married a prostitute, one of the lowest down prostitutes in entire Clifton.

Q. They had a child?

A. Yes, sir.

Q. Do you know any other?

A. Yes, sir. Another woman, Mercedes, a big woman that is drunk all the time. She has got 5 or 6 children of her own she cannot take care of. I have many times had to stop with my team. She was so drunk she could not get around. She's got a little bit of a shack fixed up with old oil boxes tacked up.

Q. Do you know any other one personally?

A. No, sir; that is all. I may say I know the others are on Chase Creek but I do not know anything about them at all.

Q. Do you know generally the character of the Mexican people in Clifton?

A. Yes, sir.

381 Q. What kind of people are they?

A. They are half Indians and the lowest kind: they work for anything; two dollars, some get three dollars; the balance get two dollars a day; and I know taking out the provisions and everything it never amounts to more than eighteen dollars, and that amounts to a whole month.

Q. What do you know about them intellectually?

A. They cannot either read or write; that is——

Q. That is the majority of them?

A. Yes, sir; after these children were taken away they themselves said they were glad it was done. They said they could not give them the homes those children have if they tried to.

Q. Did they make any objection to the delivery of the children?

A. No, sir. I knocked at the door and they come to the door and asked me who it was; and I told them, and they said "All right" "What do you want." I told them and they voluntarily give the children back. At this time I called up a couple of the boys and they came up and took the children while I went on to another place. It was raining hard.

Q. Did they give any reason why they had taken them originally?

A. Nothing more than this: They said the padre issued a proclamation or something in the church saying that these children was to be given away and anyone that wanted them should put in
382 an application and they could get one.

Q. Was there a condition placed on the assignment of them?

A. I never heard; never asked to that effect.

Q. Were they given to them voluntarily without any consideration?

Petitioner objects to the question on the ground the witness says he don't know.

Cross-examination.

By Mr. T. D. Bennett:

Q. You were with me when we went to the home of Mrs. Guerra on that day up on Chase Creek?

A. No sir; I was not with you. If you remember I left you after we went to Cornelia Chacon's house and I met you after you come across the river.

Q. Do you know how many rooms there are in her home?

A. No, sir.

Q. Do you know who she is?

A. No, sir; I don't know.

Q. You say you went to John Maxwell's home that evening?

A. I went there with you. Don't you remember when you were on top of the hill?

Q. Do you remember what preparation John Maxwell's wife stated she had made for the child?

A. That is where I met you don't you remember. As I came down with Harry Wright.

383 Q. Do you remember what preparation she had made or which she told us she had made?

A. No, sir; I was not there interpreting at all then. Some body else was there interpreting. I quit you all and then took you back.

Q. Do you know whether Chacon owns his own home?

A. I believe he does; yes, sir.

Q. Did you say that is not a good home?

A. That is what I say; that is the only decent home those children were left in, as I told you and tell the counsel now.
Q. Is there a floor in the rooms in that house?
A. The only rooms that I went in they had adobe floors two rooms I was in.
Q. Are you sure about that?
A. Yes, sir: The other rooms I have been in were both adobe floors.
Q. Do you remember the children that came from that home?
A. No, sir; I do not. I know there was a boy and a girl.
Q. Do you know whether it was Jerome Chanley?
A. No, sir. I do not know the names at all. I know I took the girl and I believe George Fraser took the boy down when we took them in town.
Q. Do you remember, or were you present when we had had a talk with her about the children?
A. No, sir; you were in there yourself, because I told you
384 she could talk English, and that settled it; and you went in there and talked to her yourself.
Q. Were you present when we talked to Franceta Alvidras?
A. Yes, sir; I was. She came out and we didn't get out of the buggy at all. She came out of the house.
Q. Do you remember whether or not she was asked whether she gave up the children willingly?
A. Yes, sir.
Q. What did she say?
A. She said they came there and knocked. She could not do anything else but give up the child. These were her words.
Q. Do I understand you to say you do not know the woman "Guerra."
A. No, sir; I do not. How do you spell the name?
Q. G u e r r a.
A. I do not know anybody of that name in my end.
Q. She is the one that had Marie Mack.

(By Mr. T. D. BENNETT: It is "Garcia" on your list Mr. Bennett.)

Q. Do I understand you to say that some of those who have children now drink and gamble. I mean the people who had the children from homes they were taken.
A. Oh, yes.
Q. Where have you seen them?
A. Right in their own homes. I have seen Bonillas up town.
385 Q. In whose saloon?
A. In the Italian saloon—Salinas.
Q. Did you ever see him in Harry Wright's saloon?
A. No, sir; because I do not go around saloons nights. I only see him at times when I deliver.
Q. Did you ever see him in Sam Abrams saloon?
A. No, sir.
Q. What is the occupation of Harry Wright?

A. Saloon-keeper.
Q. What is the occupation of Sam Abrams?
A. He runs the Clifton Hotel.
Q. What else?
A. I believe the saloon goes too.
Q. What kind of saloons are these—open, public saloons where the ordinary drinking and gambling go on?
A. I believe so.
Q. You know that as a matter of fact?
A. Yes, sir.

By Mr. IVES:

Q. When you went to these Mexican homes to get these children, did you explain in each instance that a citizens' meeting had been held and you were appointed to get the children.
A. Yes, sir; I told them and they were perfectly willing to give them up; I told them a citizens' meeting had appointed a committee to get these children. They said "What are you going to do
386 with them" and I said, "Take them up to the hotel."
Q. Are not there a lot of good people who get drunk and gamble sometimes?

(Respondents object to the question as calling for a conclusion which the Court is able to draw.)

Q. Do any of those people who now have the children drink and gamble?
A. I guess they can afford it and those other people could not afford it.

(Petitioner objects to the answer and moves that it be stricken out.)
No ruling by the Court.

Q. Do any of these people who now have the children drink and gamble?
A. I cannot say.
Q. You never saw any of them take a drink?
A. I have seen them take a drink—yes, sir.

By Mr. MCFARLAND:

Q. Were you present in the drug store, I think it was, on Sunday when Mr. Swayne was there and some others?
A. No, sir; that was Monday, October 3d when we waited on Mr. Swayne and the Priest in the drug store. As the feeling seemed to be very high there, Mr. Parks, the deputy sheriff, and a couple of others told the audience that they had him down there, and they talked to Swayne and the Priest—and Judge Little was along
387 there too—to see what kind of a solution they might come to. So I was appointed on a committee to go down and wait on them. Also I went in there and asked the Priest how long he had been in the parish and he says, "Four months." I says, "Could you not tell in four months what kind of people these people were?" He says, "They regularly come to church" and thought they were

the "right kind of people." I says to Mr. Swayne, "When you give these children away, didn't you think they were not Castilians and not the right kind of people?" He says, That is my business. I have been carrying on this business 35 years," and then Judge Little talked to Swayne, and he (Swayne) said "the children would stay where they were until further orders were received."

By Mr. IVES:

Q. At that time the children had been distributed among the present families?

A. Yes, sir; that was Monday night about half past eight.

By Mr. MCFARLAND:

Q. What did you mean by "Stay where they were." Where were the children then?

A. They were in the present families, and Swayne said they were to stay there until he heard from New York or got advice to do otherwise. That was Swayne's remarks.

Witness excused.

388 L. J. DUNAGAN, recalled as a witness on behalf of the respondent, testified further as follows:

Examined by Mr. MCFARLAND:

Q. You went with Mr. Simpson up to Morenci?

A. Yes, sir.

Q. From Clifton on Sunday?

A. Yes, sir.

Q. You were present at the hotel in Morenci at the time Mr. Mills was there, and Mr. Swayne and Mr. Simpson?

A. Yes, sir.

Q. What did you say when you went to find Mr. Swayne there at the hotel in reference to the Clifton children?

A. Well, I wasn't the first one that had talked with him; Mr. Mills was the first man that had talked with him.

Petitioner objects to the testimony, as being a repetition.

Mr. Chief Justice KENT: Haven't we been into that?

Mr. MCFARLAND: I think to some extent, if the Court please; yes, sir.

Q. Were you present at the hotel when the children were being delivered back?

Mr. Chief Justice KENT: The recollection of some members of the Court is that this witness did not testify as to Clifton, but as to Morenci. If that is true, and this is material he may be allowed to testify as to the conversation is regard to Clifton. Have you detailed that conversation, Mr. Witness?

389 A. I stated it; yes, sir.

Mr. MCFARLAND: Then that is all we desire. We will withdraw the question, then.

Q. Were you present at the hotel when these children were being returned from the town?

A. In Morenci?

Q. Yes, sir.

A. Yes, I was present and taken the names of all the Mexicans that were bringing the children back; I was asked to by Mr. Mills, as he wanted their names in order that he could take Mr. Swayne to his books and show him the salary that these people were drawing, and who they were.

Mr. Chief Justice KENT: The Mexicans you refer to?

A. Yes, sir.

Q. Did you do that?

A. I taken their names; yes, sir.

Q. Did you do that alone, or have assistance?

A. I had to get a man to help me, as the Mexicans couldn't sign their own names, with the exception of two that was able to sign their own names.

Q. Only two of the entire lot that could sign their own names?

A. Yes, sir.

Q. What, if anything, was said by these Mexicans when they delivered these children there?

390 A. Either seven or eight demanded their money.

Q. What money?

A. Money that they had expended——

Petitioner objects to the question.

Mr. Chief Justice KENT: He may state what was said; he can't draw his conclusions as to what money it was.

Mr. IVES: Is this evidence as to the fact any money was paid? This is an effort on their part to prove the fact that money was paid.

Mr. Chief Justice KENT: This witness was present and heard the conversation between them.

Mr. IVES: If he was present when any money was passed, or if any of our people admitted they were paid money, that is a different thing; but for this witness to testify that people told him that they had paid money is hearsay.

The WITNESS: This conversation was between me and the Mexicans that were bringing the children back.

Mr. WALTER BENNETT: It seems to me that this testimony has taken a wide latitude; much latitude has been given to the petitioner, and we think the respondent should have as much latitude. What was said by these Mexicans was said by the priest; and now we think what was said by these Mexicans when they returned these children is equally as much a part of the subject-matter as what was said by the Mexicans to the priest when these respondents were not

391 present; and we think what was said by the Mexicans at the time they returned the children is competent.

Mr. Chief Justice KENT: It certainly is not competent evidence as showing that money was paid, and if allowed to go in at all it can only be to establish a condition existing at the time, not as establishing that money was paid.

(Objection argued to the Court by counsel.)

Mr. Chief Justice KENT: We don't understand this related simply to matters that took place at Morenci; how is it at all material in that connection?

Mr. WALTER BENNETT: If that be true, then nothing that occurred at Morenci can be material. Now, this transaction has been gone into as being all one transaction. Now, if this was an action for money paid, it would be immaterial; but we do think in this instance this matter of establishing a condition, such as the conversation between the priest and the people at the time of delivering these children, is competent.

(Objection argued further to the Court by counsel.)

Mr. Chief Justice KENT: We will exclude the testimony.

(Respondent excepts to the ruling of the Court.)

By Mr. MCFARLAND:

Q. Now, what was said by Mr. Swayne, if anything, when you asked him to return to Clifton and explain the conditions that existed there, why he placed those children in the homes of the Mexican people?

A. He was asked this question more than one time. He
392 was asked the question several times before he consented to do it. He never did say whether he would or would not until he was ordered to collect the children in Morenci.

Q. He declined, I understand you to say, to do so when you first asked him to do so?

A. Yes, sir.

Mr. IVES: To do what?

A. To take these children from the Mexican families and take them back from the Mexican families—is that it? I don't understand where we are at.

Q. When you were talking to him about the Clifton children?

A. The Clifton children is the children we spoke of first when we first arrived there; that is what we spoke of first to him.

Q. What did you ask him in reference to the Clifton children when you first arrived there?

A. My testimony the other day is just as it occurred, with the exception of a few things that wasn't brought out, the answers he gave in regards to the action that had been taken.

Q. Did he decline?

A. The first step that the Morenci people taken, or the first time that they demanded him to do anything, was when he was asked the question that it didn't look as if he was an American he *he* wouldn't handle Americ an babies as he had handled them; and he says,
393 "I am an American citizen, but I am ashamed to acknowledge it."

Q. That was among the first things he said?

A. It was then that the Morenci people gave him, I believe, an hour or two to collect the children, after that remark. But he never consented to do anything at Clifton until Monday night, after Mr. Little arrived from Solomonville.

Q. I will ask you what did he say then about the Clifton children;

what did you ask him about the Clifton children when you first went up there?

A. Asked him what he expected to do with them; if he expected them to remain in the places he had put them. He said they would remain where he had placed them; he didn't propose to be dictated to by the people.

Q. Was that fact communicated to Clifton; do you know of your own absolute knowledge that was communicated?

Petitioner objects to the question, on the ground that this same witness testified the same fact yesterday.

Mr. McFarland: If they will concede the fact that no action was taken in Clifton until after they had his——

Mr. Ives: That is proved.

Mr. McFarland: —answer that he wouldn't do anything about the children.

Mr. Ives: There is no question about it.

Q. Did you hear any threats at the hotel on Sunday, while you were there?

394 A. At Morenci?

Q. Yes, sir.

A. No, sir.

Mr. Chief Justice Kent: Have you testified as to this question asked you now—do you recollect?

A. Yes, sir.

Cross-examination.

By Mr. Ives:

Q. Did you tell Mr. Swayne that there were tar and feathers and a rope there?

A. I did after the meeting was all over; yes, sir; I told him it was setting in front of the door.

Q. Was it there?

A. To my knowledge; yes, sir; the tar and bucket was; I didn't see any feathers.

Q. Did you see some mattresses?

A. No, I didn't see any.

Mr. Chief Justice Kent: When was that?

A. That was; the first I seen of it was—it was Sunday night we returned from Morenci—it was on Monday morning.

Q. Did you see Sister Anna with streaming eyes protesting she didn't like the appearance of these Mexican families?

A. I did, sir.

Witness excused.

395 GEORGE FRAZIER, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. Where do you reside?
A. Clifton, Arizona.
Q. How long have you resided there?
A. 20 and a half years.
Q. What is your business?
A. Smelter superintendent for the Arizona Copper Company.
Q. Were you there on the second of October last?
A. I was.
Q. You live in Morenci or Clifton?
A. Clifton.
Q. Were you there at the time the carload of children from the New York asylum arrived?
A. I was.
Q. Did you see them when they arrived?
A. I saw them about 15 minutes after they arrived.
Q. Did you go inside the car at all?
A. No, sir; myself and wife went up to the depot. We were going up after our mail and we were told by several white ladies that there was a carload of white children up at the depot. We then went to the depot and saw the little children as they were coming out of the car.
Q. What was being done with the children?

396 A. They were taking them out of the car, several white ladies; Mrs. Abram, Mrs. Wright, and Mrs. Simpson, and I think Mrs. Parks; they were handing them down the car across the platform to go into the stages.

Q. When they were all loaded into the stages, where did they go, if you know?
A. They drove off in the direction of Chase Creek; I suppose to the Catholic church.
Q. Did you follow them?
A. No, sir.
Q. Were you present at the Catholic church or priest's house when the children were distributed?
A. No, sir; I wasn't there.
Q. You don't know anything about that?
A. No, sir.
Q. Did you have any interview with Mr. Swayne or Father Mandin at Clifton?
A. No, sir; I didn't have any direct conversation with them, but at the meeting there when he came down from Morenci he explained several things to the people at the meeting there.
Q. What did he say?
A. The priest was asked first to give an account of why he had brought these children to the Mexican homes here; and he said that he was a foreigner, and he didn't know that there was any

difference between the American people and the Mexicans. He said he couldn't see any difference between them.

397 Q. Was Mr. Swayne present at that time.

A. Yes, sir; he was alongside of him, standing side by side.

Q. What, if anything, was said by Mr. Swayne about the distribution of the children to the Mexicans?

A. I couldn't say much what he said. He was very stubborn at first; wouldn't say anything, and it aroused the people to quite a hard feeling there.

Q. Was he asked by the people to take the children away from the Mexicans?

A. Well, no; the children had already been taken away at that time, but I am positively sure he said he knew his business in bringing the children here and putting them with the Mexican homes.

Q. Do you know the character of Mexicans to whom these children were delivered?

A. Well, I know mostly all of the Mexicans, but I don't know as I know them by name. I have worked amongst them for a number of years, 20 years; and I know some of the families that had them. I know Alvidras and Chacon.

Q. What are the class of Mexicans to whom these children were delivered?

A. This class that was given the children was the lowest class Mexicans that we have in the town. There are some good Mexican families which didn't have them.

Q. These that you do know personally of those whom the

398 children were distributed to, what class of people were they?

A. They were very poor people, and I don't think was able to support——

Q. What was the class of homes, of their houses, etc., where they live?

A. Very poor. Little, some has little adobe houses with mud floors; others have small lumber houses; they are not any more than about 10 by 12.

Q. What are the characteristics of these Mexicans with reference to their intellect and their morals?

A. They have no intellect, and they are moral, some of them.

Q. These I am asking of that have these children?

A. They are not intellectual people at all; as to morals, I couldn't vouch for them.

Q. What do you know about them drinking and carousing?

A. These foreigners generally drink up everything they make; yes, sir.

Mr. Ives: Are you talking about these particular families or Mexicans in general?

A. These particular families I have mentioned.

By Mr. Walter Bennett:

Q. How are they as to cleanliness?

A. Not these men particularly; but generally as a rule, I have seen them come to the works never washing their faces from one

week's end to the other. I have seen them from the marks of
399 perspiration running down their faces come the next morning with the marks of the perspiration on their faces yet. I have sent them home and told them to wash their faces.

Q. Were you one of those who went with Mr. Leggatt when the children were gathered up from the Mexicans?

A. I was.

Q. Where did you first go, what house?

A. First to Francisco Alvidras' house.

Q. What kind of a place is that?

A. A little two-room house, one lumber and one adobe. It is on the side of a hill there.

Q. How is it as to cleanliness and comfort?

A. Well, I couldn't say as the place was filthy, but still it wasn't clean. The corral where they keep their burroes and mules was right against the door of the house.

Q. Do you know the woman, the wife?

A. Yes, I have known her for a few years.

Q. What kind of a woman was she?

A. She is a woman I have seen very drunk on the streets, that is about all I know of her.

Q. Where did you next go?

A. Well, we went from there across the river, the canyon.

Q. Just a minute. Did you get a child from the first house you went to?

A. We got two children from the first house.

400 Q. Was there any objection made by the party to delivering them up?

A. None whatever. Mr. Alvidras, Francisco Alvidras, himself told me, he says, "Take the children away, George, you know I can't support them. You know it takes me all my time to support myself." He is an old man probably 65 or 70 years old, and we give him work at the smelter sometimes as a case of charity. He has two old horses and hauls wood to people in town. He isn't scarcely able to take care of himself.

Q. Was there any suggestion of force or violence to induce him to give up the children?

A. None whatever.

Q. Do you know what child it was, was it a boy or girl?

A. There was two; one boy and one girl.

Q. Do you know what their names were?

A. No, sir.

Q. Do you know who now has those children?

A. No, sir; I don't.

Q. Where did you next go?

A. We went then to Lee Windom's house. There was one child there, and I asked two men to take that child to the hotel while the balance of us went to Chacon's.

Q. At Windom's house—do you know Windom?

A. Yes, sir.

Q. Do you know his wife?

400½ A. I couldn't say whether she is his wife or living with him. I know her former husband is still at the smelter; Costello Gonzales was her former husband.

Q. What kind of a woman was she?

A. I couldn't say much about her; I didn't know her very well.

Q. Is she a woman of good repute and character?

A. I don't think so.

Q. What kind of a home do they have?

A. Two small adobe houses.

Q. Two small adobe houses or rooms?

A. Two small adobe rooms about 10 by 12 each; adobe floors and flat adobe roofs.

Q. What does adobe floor mean?

A. It is a mixture of mud and hay formed into bricks; the walls are built of these, and the roofs is poles put across and brush, and then a layer of mud on top. The floor is made of this mud. They sprinkle it every morning and sweep it to keep it dry and hard.

Q. How was the house as to cleanliness?

A. Chacon lives, I think——

Q. I am speaking of the Windom house now?

A. What kind of a house?

Q. How was Windom's as to cleanliness?

A. It didn't look very cleanly.

401 Q. Have they any children of their own?

A. No, sir. The walls are whitewashed and plastered—it is all off inside, and it didn't look very comfortable to me as a home.

Q. What kind of man is Windom?

A. I don't know much about him. He is a rather shiftless man. He never stays very long in one place.

Q. Does he drink or gamble?

A. I haven't seen him the worse for liquor; no.

Q. Where next did you go?

A. To Chacon's house.

Q. What did you find there?

A. Two children there.

Q. When you went to Windom's was there any objection made by him to surrendering the child?

A. No, sir; none whatever.

Q. What was said?

A. We mentioned the citizens had made us a committee to come and collect the children; and she just looked at us a little while and said, all right.

Q. Was there any objection made?

A. No objections to my knowledge.

Q. Was there any suggestions of any force or violence?

A. No, sir; none whatever.

Q. Where did you go next?

402 A. To Chacon's.

Q. What occurred there?

A. There were two children there, a boy and a girl. Mr. Leggatt

was ahead of us. He knocked on the door and told them that we had come after the children, and we stood outside the door half or three-quarters of an hour; I couldn't say how long, but a very long time; and I knew Chacon having worked for me, and I knocked at the door and told him who I was, and Mrs. Chacon opened the door and asked me to come inside and wait until she dressed the child.

Q. Did you go in?

A. I went in and sat down, and she dressed the child and got it ready—she did ask me if I had an order from the padre to take the child; but I said, No; I said the citizens of the town demand the children back, brought back to the hotel. She dressed the children and we carried them up.

Q. Was there any suggestion of force or violence to take them?

A. No, sir.

Q. Was there any unwillingness manifested by the woman to taking the children?

A. No, sir; none. She was just as willing as could be, very obliging and accommodating.

Q. Do you know Chacon and his wife?

A. I don't know much about Chacon's wife. I know
403 Chacon. I know that they have a house and it is mortgaged for what their house is worth. I know he owes several men in the town sums of money; for instance, myself. He owes Mr. Crum, the butcher, a bill of $35, which he has not been able to collect for months and months.

Q. What is the condition inside the house?

A. Adobe floors and walls. The wall is papered in one room.

Q. Mud floor?

A. Yes, sir.

Q. Have they any children of their own?

A. No, sir.

Q. Where did you next go?

A. We went then to the Clifton hotel.

Q. That was the last place?

A. Yes, sir; that was the last place I went.

Q. Do you know the people who now have these children?

A. Yes, sir; I do.

Q. State to the Court generally what class of people they are?

A. Well, I think they are all good citizens; honest, upright people.

Q. Are they financially able to take care of these children?

A. They are, to my knowledge.

Q. How is it as to their intellect and morals?

A. They are as good people, upright and moral and as
404 good character as any citizens, I think, we have in the town.

Q. In fact, could there be better homes found for these children in or around Clifton or Morenci?

A. No, sir; there couldn't.

Cross-examination.

By Mr. IVES:

Q. You have one of these children, haven't you?

A. Yes, sir; I have.

By Mr. WALTER BENNETT:

Q. You have one of these children?
A. Yes, sir; I have.
Q. Is it a boy or girl?
A. Girl.
Q. And the name?
A. Hannah Kane.
Q. Are you financially able to take care of and support that child?
A. I am.
Q. Do you desire to do so?
A. I do.
Q. Are you married?
A. Yes, sir.
Q. Have you any children of your own?
A. No, sir; none of my own.
Q. Any children in your family?
405 A. No, sir.
Q. Does Mrs. Frazer likewise desire to retain the child?
A. She does.
Q. Have you become attached to the child?
A. We have.
Q. Has the child become attached to you?
A. It has.
Q. Is the child happy and contented in your home?
A. It is just as happy as can be.
Q. Is the child present in court?
A. Yes, sir.
Mr. WALTER BENNETT: Exhibit it to the Court.
(Child shown to the Court.)
Q. If permitted by the Court to keep this child, is it your intention to rear it as your own?
A. Yes, sir.

Cross-examination resumed by Mr. IVES:

Q. You have become very much attached to this child?
A. Yes, sir; we have.
Q. If you believed that the future welfare and happiness of this child would be improved by your surrendering it, would you be willing to surrender it?
A. If I thought or if you could give me proof that it would have a better home than I could give it, I would surrender it.
406 Q. If I could give you proof that its welfare and happiness would be improved by surrendering it, would you surrender it?
A. Yes, sir; I would, if I thought it could.

Witness excused.

Mrs. OLIVE FREEMAN, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Mr. IVES: I suggest that it is purely cumulative to introduce this testimony, and it don't seem to me time should be consumed in giving it. I will concede that this witness will testify to exactly the same facts—she, I understood, has one of these children—as the others have testified. We have no evidence to contravert it. I don't see the necessity of going over this time after time. I believe the Court knows the facts of this case, as far as the old features are concerned, thoroughly. I will concede this witness will testify the same as the other ladies have testified.

Mr. WALTER BENNETT: It is not our purpose or intention to delay, or occupy the attention of the Court longer than is necessary for a full understanding of this case; but we do think this case is of sufficient importance that the testimony of these witnesses ought to be presented to the Court in person. In his particular case the facts are somewhat different than in the other cases, and we ask leave of the Court to present it.

407 Mr. Chief Justice KENT: You may proceed.

Mr. NAVE: May I call the attention of the Court to the fact that the only case being heard by the Court is the one in which Mr. Gatti is respondent, and that there is a stipulation that the other cases will follow the same course as the Gatti; and this evidence does not seem to be relevant in the Gatti case.

Mr. WALTER BENNETT: I understand the Gatti case is simply taken as illustrative. If that be not true, then the suggestion of Mr. Nave would be true, and a vast amount of the testimony might be cut out. I understand this is a trial of the whole matter; on the basis of the Gatti case evidence has been introduced which has no relevancy to the Gatti case.

Mr. IVES: I agree with the view of Mr. Bennett. Mr. Nave wasn't here at the time that matter was brought out.

Mr. Chief Justice KENT: We suggest it would be desirable when the testimony is closed that there be a stipulation on the record that the testimony in this case may be allowed to cover the other cases.

Mr. T. D. BENNETT: We desire to so stipulate; and if we are unable to stipulate we will submit the matter to the Court.

Direct examination of the witness by Mr. WALTER BENNETT:

Q. Where do you reside?
A. Clifton, Arizona.
Q. How long have you resided there?
A. Four years.
408 Q. Are you married?
A. Yes, sir.
Q. What is your husband's business?
A. Architect and builder, and also runs a planing mill.
Q. Were you present when these children were brought to Clifton?
A. No, sir.

Q. You were not at the car at all?
A. No, sir.
Q. Were you at the priest's house or the church when they were distributed to the Mexicans?
A. No, sir.
Q. Were you at the hotel when the children were returned?
A. No, sir.
Q. You know nothing that occurred at any of those places of your own knowledge?
A. No, sir.
Q. Have you now one of these children?
A. I have.
Q. What child have you; what is the child's name?
A. Sadie Green.
Q. A little girl?
A. Yes, sir.
Q. How old?
A. Two years the 21st day of September.
409 Q. How long have you had this child?
A. Since Sunday night that they gathered them.
Q. October 2nd?
A. Yes, sir.
Q. Under what circumstances did you have the care of this child?
A. I don't understand you.
Q. Under what circumstances; tell the Court how you came to have this child?
A. I was out driving on Sunday, and as I was driving up North Clifton I met Lee Windom with this little baby in his arms, and I asked him if this was one of those little babies that were given away last night, and he said it was. And I put out my hands to the child and it cried to come to me, and I took the child and handed it back to him, and I went home and told my husband and son-in-law about this little one; and when they gathered the children that evening my son-in-law was one of the committee that gathered the children, and he fetched the little one that I had spoken of direct from the Mexican home to my house; and the child was a very sick child, purging and vomiting—it threw up whole beans, and the odor of beer something terrible.
Q. Who is your son-in-law?
A. Edward Heyle.
Q. Then the child you now have was one of the children that was given to the Mexicans, but not one that was brought to the hotel?
410 A. Not one that was brought to the hotel.
Q. Have you children of your own?
A. I have three married and one little daughter very near 16; that is all.
Q. You have got the child now?
A. Yes, sir.
Q. Is it here present in court?
A. Yes, sir.

Q. Is that the child now upon the railing?
A. Yes, sir.

(Child exhibited to the Court.)

Q. Are you financially able to take care of that child?
A. I am.
Q. Is your desire to do so?
A. It is. And if they should take that baby from me it would wreck my home.

Witness excused.

Mrs. MAY SIMPSON, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Mr. T. D. BENNETT: We would like to renew our objection the same as made a few moments ago.
Mr. Chief Justice KENT: The objection will be overruled. We expect the stipulation will be on the record that the testimony in this case will cover all the cases.

Examination by Mr. WALTER BENNETT:

Q. Your name?
411 A. May Simpson.
Q. Where do you reside?
A. Clifton, Arizona.
Q. How long have you resided there?
A. Nearly 17 years.
Q. Are you married?
A. Yes, sir.
Q. What is your husband's name?
A. Thomas Simpson.
Q. What is his business?
A. Locomotive engineer.
Q. He is the same gentleman who testified this morning?
A. Yes, sir.
Q. Were you present at the time this carload of children was brought to Clifton?
A. I wasn't at the train, but I was in the hotel.
Q. You didn't see them unloaded from the train?
A. I did not.
Q. Did you go to the priest's house or the church where they were distributed?
A. No, sir.
Q. Where did you first see any children?
A. I first saw the children when they were brought into the hotel between the hours of 10 and 12.
Q. What, if anything, did you do with reference to the Children?
412 A. I helped nurse those that were sick, and stayed till 2 o'clock in the morning; and I took one little girl, which I

now have, into my room. We were living in the hotel. I took her into my room that night and still have her.

Q. What was the condition of the children when they were brought to the hotel?

A. With the exception of three or four of the children, they were all very sick, throwing up, and some of them had high fevers.

Q. What was their condition as to cleanliness, or otherwise?

A. Very dirty; they had been neglected, and I suppose the children couldn't make their foster-parents understand, or the people to whom they had been given, understand; and they were in a filthy condition.

Q. Can you be more specific as to what condition they were in as to lack of cleanliness—what was the condition of their heads?

A. Their heads, that night I don't know, except one or two children were scratching terribly; and in particular the one that Mrs. Henry Hill has, just cried and scratched his head all night long; and we discovered—the ladies all discovered after they had their babies a few days, that they were lousy, very lousy.

Q. What was the condition of the child you had in that respect?

A. Well, she had a few, but not as many as I heard the
413 other ladies tell that theirs had.

Q. Is the child you have a boy or girl?

A. Girl.

Q. How old?

A. I really don't know her exact age, except I hunted up the Mexican woman that had her, and she told me she was nearly three years old; and she sent out for a little girl who could talk English, and the girl said she would be three years old the 21st of last October.

Q. Is that child now in court?

A. She is in one of the side rooms; yes, sir.

Q. What is the name of the child?

A. Anna Louise Dougherty.

Q. Are you and your husband able to support and maintain that child?

A. Yes, sir.

Q. Do you desire to do so?

A. I do.

Q. Have you formed an affection for the child?

A. We have, both of us, a great affection for her, and she has for us.

Q. If permitted by the Court to keep this child, is it your intention to rear and maintain it as you- own child?

A. It is.

Witness excused.

414 Mrs. Rebecca Tong, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. Walter Bennett:

Q. Where do you reside?

A. Metcalf, Arizona.

Q. Where is Metcalf?
A. About seven miles above Clifton; perhaps 10.
Q. How long have you resided in or near Clifton, or Metcalf?
A. Well, we have been — 40 or 50 miles of Clifton and Metcalf for 19 years.
Q. What is your husband's name?
A. J. T. Tong.
Q. What is his business?
A. Machinist.
Q. Does he work in Clifton?
A. He works at Metcalf.
Q. For what company?
A. For the A. C., I suppose—I think that is it, isn't it? The Clifton Arizona Copper Company.
Q. Were you present when this carload of children were brought to Clifton?
A. No, sir.
Q. Were you present at the priest's house or the church when they were distributed?
A. No, sir.
415 Q. Were you at the hotel when they were returned?
A. No, sir.
Q. When did you first see any of the children?
A. Well, I think the first I saw of them, I had a friend going to the World's Fair, and he phoned me that there was a carload of children in Clifton to be given away; and he knew I had sent by several parties going to California, asking them to visit a home and see if there was any way for me to get a child.
Q. Then you went to Clifton, did you?
A. Yes, sir. He phoned me that they were there, and he says come down; but the babies weren't there then; that is the sisters weren't there and the agent—the babies were there.
Q. Where were the babies, at the hotel?
A. No, sir; they were with the Mexican families; that was on Sunday morning.
Q. Were you at the hotel when the children were returned there?
A. No, sir.
Q. When did you first see any of the children?
A. As I say, when I came down Sunday morning, I seen them with the Mexican people.
Q. How many children did you see with the Mexican people?
A. I seen two.
Q. What kind of people were the Mexicans you saw them with?
A. This Mr. Windom I have known 10 years. I seen his
416 baby; I went especially to see it, because I knew him.
Q. What other Mexicans did you see?
A. I couldn't tell the name; two little Mexican children leading this little girl; had it between them, and they pointed it out as one of the babies. And I have seen it since, but I don't remember its name.
Q. Have you one of these children?

A. Yes, sir.
Q. Where did you first see the child which you have?
A. At Mr. Abrams' hotel.
Q. Were you present in the night when the children were brought in?
A. No, sir.
Q. When did you see them next morning?
A. I saw them Monday morning about 10 o'clock.
Q. You didn't help take care of them that night?
A. No, sir.
Q. And don't know their condition when they were brought in?
A. No, sir; only my own child, its fever was 104. I took it to the doctor, Dr. Horne, soon after I got it in the afternoon; brought him up to Dr. Horne; I was afraid and very much alarmed about it. I have nursed a great deal myself, and I knew it was in a dangerous condition.

Q. What was its condition as to cleanliness, or otherwise?
417 A. Its little head had lice on it, and its hair was covered with dead and live nits, as we call them.
Q. Have you this child now?
A. Yes, sir.
Q. Are you financially able to maintain and support and educate it?
A. I am.
Q. Do you desire to do so?
A. I do, very much.
Q. Does your husband desire to do so?
A. Yes, sir.
Q. Have you become attached to the child?
A. Very much.
Q. Has the child become attached to you?
A. Yes, sir.
Q. Is the child present in court?
A. Yes, sir.
Q. Where is the child?
A. That is it right there. (Witness indicating child in the audience.)
Q. If permitted by the Court to keep the child, is it your intention to rear it as your own?
A. Yes, sir.

Witness excused.

418 Mr. IVES: I will concede each of these people, if called, would testify to the same as the other witnesses have as to these former facts.

Mr. Chief Justice KENT: In regard to this testimony that has been introduced from several witnesses, as to the uncleanly condition of the children, we do not understand that the respondents make any claim in this case that that uncleanly condition was due from any lack of care on the part of the hospital authorities. It is only because

of the fact of their having been delivered to these families in Clifton and Morenci that that condition was brought about?

Mr. McFARLAND: Oh, yes, sir; that they got them from the Mexicans.

Mr. WALTER BENNETT: We don't claim these children when they were brought in the car by this New York asylum, or suggest that these children were in a filthy condition.

Mr. Chief Justice KENT: We thought that would be desirable to be on the record.

Mr. WALTER BENNETT: We don't desire that to be understood by the Court at all. We don't desire to concede that the responsibility for the condition may not rest with the New York asylum; but that they were directly responsible for it we do not contend.

Mr. Justice DOAN: The understanding is this condition arose from their care in the Mexican homes during the night and
419 day they were there?

Mr. WALTER BENNETT: Yes, sir.

HENRY HILL, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. Where do you reside?
A. Clifton, Arizona.
Q. How long have you lived there?
A. 23 years.
Q. Are you married?
A. Yes, sir.
Q. Have you and your wife any children?
A. Yes, sir.
Q. How old are they?
A. 18 and 20; two daughters.
Q. Are they married or unmarried?
A. One married.
Q. And one unmarried?
A. One single; yes, sir.
Q. The single daughter live at home with you?
A. Yes, sir.
Q. Were you present when this carload of children was brought into Clifton?

A. No, sir.

420 Q. When did you first see any of them?

A. It must have been two weeks after they come to Clifton. I was in Solomonville at the time.

Q. How did you come to be in Solomonville?
A. As a member of the board of supervisors, I was then.
Q. Of Graham county?
A. Yes, sir.
Q. Were you there on official business?
A. Yes, sir.
Q. Have you and your wife one of these children in your home?

A. Yes, sir.
Q. Is it a boy or girl?
A. Boy.
Q. How old?
A. Four.
Q. What is the name of the child?
A. Raymond Spencer.
Q. Is he present in court?
A. No, he is down at the Adams hotel.
Q. He is in town?
A. Yes, sir.
Q. Are you financially able to take care of this child?
A. Yes, sir; I am.
Q. Do you desire to do so?
421 A. I do.
Q. Have you become attached to the child?
A. Yes, sir.
Q. Does your wife likewise desire to retain the child?
A. Yes, sir.
Q. Has she become attached to it?
A. Yes, sir.
Q. Has the child become attached to you and Mrs. Hill?
A. Yes, sir, it has.
Q. If permitted by the Court to do so, is it your purpose and intention to rear this child as your own?
A. Yes, sir; it is.
Q. The child is not present at this time in the court room?
A. No, sir; he is down at the hotel. He was here this morning, but he got fidgety.
Q. Do you know anything about the condition of the child when it was first brought to your home?
A. It had whooping cough; it was pretty bad. That was what I was told. I wasn't there, but it was getting better when I got home. A good many of them had the whooping cough bad.
Q. The child is well and happy now, is it?
A. Oh, yes; splendid.
Q. Do you know the character of Mexicans to whom these children were distributed?
A. Well, yes. I don't know one of their names from the
422 other. I know the character of them.
Q. What are they, generally?
A. They are a poor class.
Mr. Ives: That has been over many times.

Cross examination.

By Mr. Ives:

Q. Did you say your single daughter was grown?
A. Yes, sir.
Q. And your married daughter?
A. She is married.

Q. She is not a widow—her husband is living?
A. Yes, sir, she is not a widow.

Witness excused.

EUGENE FOUNTIN, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. Where do you reside?
A. Clifton, Arizona.
Q. How long have you resided there?
A. About eight years this month.
Q. What is your business?
A. Refrigerating engineer.
Q. For what company?
423 A. For the Arizona Copper Company.
Q. How long have you worked for them?
A. For this company, I have been working about five or six years.
Q. Were you present at the time this carload of children arrived in Clifton?
A. I was.
Q. Did you see them taken from the train to the priest's house?
A. Yes, sir.
Q. Were you over to the priest's house at the time they were distributed?
A. I was.
Q. Were you inside the house?
A. Yes, sir; I was about one of the first that went in.
Q. Did you get one of the children at all?
A. No, sir; I couldn't get one.
Q. Did you make any application for one?
A. My wife did, but the priest said we weren't good enough Catholics to get them.
Q. Do you know the people to whom these children were distributed by the priest?
A. I know them all with the exception of two or three, I guess.
Q. Can you name them?

424 Petitioner objects to the answer to the last question, and moves that it be stricken out, what the priest said, that "We were not good enough Catholics to get them," as not binding on this institution, and not material.

Mr. WALTER BENNETT: It has not been our purpose to make any suggestion as to the religious beliefs of any of these parties, as we thought that was not proper to make. The only time anything of that kind has been injected into this case it came direct from Mr. Bennett; and I do not think it is proper for him to make objection to the response of the witness, even though it does in a measure refer to the religious belief of the party.

Mr. Chief Justice KENT: We will allow it to stand.

(Petitioner excepts to the ruling of the Court.

Q. Do you know the people to whom these children were distributed?

A. Yes, sir; with the exception of two or three.

Q. Can you name any of them?

A. Most of them I can.

Q. Just name some of them; one of them?

A. Well, one of them was John Maxwell—his name is Juan Esquival, but he goes by the name of John Maxwell.

Q. Where does he live?

A. In Clifton, very close to my place.

Q. Do you know his wife?

A. I do.

425 Q. What family has he got?

A. She has a bad character.

Q. What family has he got, I say?

A. Just his wife; the woman that he married when these children arrived in Clifton, a day or two before. She is a woman off the tenderloin district, off the saloons.

Q. Did you ever have any conversation with him with reference to why he married?

A. Yes, sir.

Q. What did he tell you with reference to it?

A. Mr. Maxwell, I asked him how he come to get those children when he wasn't as good a Catholic as I was; and he said his wife went to the priest, and the priest asked her if she was married; she told him no, she had a man but she wasn't married; and the priest told her she had to marry this man by the church to get the child.

Q. Was that the reason they married—is that the reason he told you they were married?

A. Yes, sir; that is what he told me.

Q. What other one of these Mexicans who got these children do you know?

Mr. Ives: Do you mean that is what the priest told you?

A. No, sir.

Petitioner objects to the answer, and moves that it be stricken out, as absolutely hearsay that cannot bind the petitioner.

426 Objection overruled by the Court and petitioner excepts to the ruling of the Court.

Q. Proceed. What other one of the Mexicans who got these children do you know?

A. Ygnacio Choya, he had one of the children.

Q. Was it a boy or girl?

A. Boy.

Q. What kind of a man is he?

A. He is a man I knew for about 12 years, I guess. I used to know him in Solomonville, and for the last eight years in Clifton.

Q. What does he do?

A. Nothing; just hangs around the saloon and drinks whiskey when anybody invites him. His wife does washing to support the

family. He has got five girls of his own, the oldest one about 10 years old.

Q. What kind of a house do they live in?

A. An old house built of boxes and tin cans, right by the ball ground.

Q. Do you know anything about his wife; what kind of a woman she is?

A. I think his wife is a pretty nice woman.

Q. Do you know any of the others?

A. I know Lee Windom.

Q. How long have you known him?

427 A. I have known Lee Windom ever since 1892. I used to know him in Jerome.

Q. What kind of a man is he?

A. Well, he is one of those lazy beggars that don't do much.

Q. What does he do?

A. At present he is working for the Arizona Copper Company. He has been working for about a month, I guess.

Q. Do you know his wife?

A. Yes, sir.

Q. How long have you known her?

A. Ever since I have been in Clifton, eight years.

Q. What do you know of her character, if anything?

A. All I know of her character is, she has had two or three husbands since I knew her, and they have all left. When I come to Clifton I got acquainted with her husband at the works; the man she was living there with; and about two or three months afterwards she left this man and went to laying up with another one. And here two or three years ago Mr. Windom came to Clifton, and she lived with him until, you know, she got sick and had to have the priest, and they got married.

Q. She lived with Windom before they were married?

A. Over two years.

Q. What other one of these Mexicans who got the children do you know anything about?

428 A. I know this Padre Levato. He is an old man about 60 years old, I guess; got lots of children of his own.

Q. Do you know his wife?

A. Yes, I do. She likes booze herself.

Q. Have you ever seen her drinking?

A. Yes, sir.

Q. Ever see this child at her house, the child she got?

Q. No, sir. I seen her—I seen the child Sunday morning on the streets. She was packing it around the street walking with it.

Q. Do you know any other one of the Mexicans who got any of these children?

A. I know the Chacon family.

Q. What kind of people are they?

A. Chacon is a man that works sometimes, and sometimes gets drunk. His wife is not a very good character; in fact none of the

family is, because her mother is married to a nigger, and her sister is a half-breed nigger.

Q. Do you know any of the others?

A. I know them all, I guess. I know Alvidras; I know him well.

Q. What kind of a man is he?

A. He is an old man ain't able to work. He hauls wood into town to sell.

Q. What kind of a house has he got?

A. An adobe house, and an adobe room and a lumber room.

429 Q. How is it as to cleanliness, or otherwise?

A. Well, they are very poor; ain't got anything.

Q. How is it as to being clean or dirty, the house?

A. Well, I couldn't tell you how clean it is; the corral is right at the door where all the burroes stand and horses; I guess the inside must be pretty dirty.

Q. Do you know any of the other Mexicans that got these children?

A. Yes, sir; I know Silvester Calvan.

Q. What kind of a man is he?

A. He ain't got a very good character.

Q. Do you know his wife?

A. Yes, sir.

Q. How is she?

A. His wife is a pretty nice woman.

Q. Have they got any children?

A. Yes, sir; they have four; three girls and a boy.

Q. What kind of a house have they?

A. Adobe house put up in the Mexican custom, dirt roof on it, and dirt floor, and adobe walls.

Q. Did you ever see any of these children in the possession of Mexicans?

A. These orphan children?

Q. Yes, sir.

A. Yes, sir; I seen, on Sunday, I believe it was—yes, on

430 Sunday, the next morning after the children arrived in Clifton, I was going home for dinner, and I had to pass Mr. John Maxwell's place; and three or four of these prostitutes were in the house drinking beer—I guess they were celebrating the welcome of the children; and the little girl Mrs. Maxwell had was running about in the yard, and she come out and I stopped there to see the child; and she called the child in Mexican, and she begun crying, and she kept telling it to stop; and finally she came outside and grabbed the child—I guess she was full of beer; I could see a lot of beer on the table; and she grabbed the child by the dress and dragged her inside.

Q. Was that one of these orphan children?

A. Yes, sir. And that evening—the yard is right by the street—and I seen one of these prostitutes carrying the child, and Mrs. Maxwell walking beside her.

Q. Do you know any of the other Mexicans who got the children that you have not testified about?

A. I know a woman lives above my place, named Mercedes; I don't know her other name.
Q. Did she have one of these children?
A. Yes, sir; and she has two or three of her own.
Q. What kind of a person is she?
A. Well, she is very ragged looking. She has got a man she lived with, ain't her husband; he works on the section at two dollars a day, and she takes in washing; and every time she gets a little
431 money, I guess, she gets drunk and lands in jail. I guess Mr. Dunagan has her in jail now; he has had her about three times in the last month.
Q. Did she have one of the children?
A. Yes, sir.

Mr. T. D. BENNETT: We apprehend the Court takes notice where the witness says, "I guess."

Q. Do you know any more of these Mexicans to whom the children were distributed?
A. I know pretty near all of them.
Q. In a general way, what class of Mexicans are they?
A. They are not real Mexicans; they are low class Indians from old Mexico.
Q. Were you at the church when these children were distributed?
A. Yes, sir.
Q. Were there any real Spanish Mexicans there?
A. There were, a lot of them.
Q. Did they get any of the children?
A. No, sir.
Q. Were you present when the proclamation was made?
A. Yes, sir.
Q. What was the nature of that proclamation?
A. Well, the priest said that there were a lot of orphan children back in the east some place, I don't remember exactly were;
432 and that all those that wanted one of these children had to be good Catholics, and to come to him and put in their application with a dollar in cash, in order to pay the expenses for these children; which all did, the most of them, I guess. And the night that the children were distributed there there was an old washerwoman there, she said to the priest, "Where's my children?"—she applied for two. The priest said there were not any more. She says, "If I ain't going to get a child," she says, "give me my two dollars back."
Q. Did she get it back?
A. I didn't see it; she didn't get no children, though.
Q. At the time the children were distributed, were you present?
A. Yes, sir.
Q. Where were you, inside the house?
A. Yes, sir; inside the house.
Q. Were there any of the Spanish Mexicans there present?
A. Yes, sir; there were.
Q. Did any of them get any of the children?
A. No, sir.

Q. Did they any of them make application for the children?
A. No, sir; they did not.

Cross examination.

By Mr. IVES:

Q. What did you say was your business?
433 A. Refrigerating engineer. I run the ice plant for the Arizona Copper Company.
Q. What were you doing inside the house when you say the children were distributed?
A. At the priest's?
Q. Yes, sir?
A. I just went like the rest of the people, just to see.
Q. How many other people beside yourself were inside the house when they were being distributed?
A. It is pretty hard to say, because the house was packed full.
Q. Of the people of Clifton?
A. Yes, sir.
Q. Inside the house when the children were being distributed by the priest?
A. Yes, sir; and there were a lot of them.
Q. Name some of them that were there?
A. I couldn't name them.
Q. Was anybody there—was Mr. Simpson there
A. No, sir.
Q. Was Mr. Gatti there?
A. I don't remember seeing him.
Q. Was Mr. Henry Hill there?
A. No, sir.
Q. Any ladies there?
434 A. Yes, sir; some ladies.
Q. What ladies were there?
A. I couldn't tell you now.
Q. Can you tell me the name of any?
A. No, sir; because I didn't pay so much attention to them; I just went there to see the children.
Q. How many rooms were in the house where they were being distributed?
A. Where I was there was just one room.
Q. Who was in the room?
A. I couldn't tell you who they were.
Q. Was the priest there?
A. The priest and Mr. Swayne.
Q. Were the sisters there?
A. Yes, sir.
Q. And the nurses?
A. I couldn't tell who the nurses were.
Q. Were the children there?
A. Yes, sir.
Q. And in addition to that there were a number of people in the room?

A. Yes, sir.
Q. How big a room was it?
A. Oh, a room, I suppose about 18 by 20 or 22.
Q. Don't you know as a matter of fact the people of Clifton
435 didn't know these children had been distributed until the next day; isn't that a fact that has been testified to here?
A. Which people?
Q. The white people of Clifton didn't know they had been distributed until the next day?
A. I guess they wouldn't some of them. I seen several white ladies in the house and white men.
Q. And you can't give the name of a single one of them?
A. I don't know their names.
Q. You know the names of a great many of these Mexicans; didn't you know the names of a great many white people in Clifton?
A. I did if I had paid any attention to where they were.
Q. I ask you the name of one white man or woman that was in that room?
A. I don't remember now who they were; there wasn't very many of them.
Q. Did you tell anybody that evening that these white children had been distributed around among the Mexicans?
A. I don't think I did.
Q. Didn't you hear these ladies testify here that they were told the children would be distributed to the white people?
A. I guess I did; but I never talked to any white people that evening. From the church, right from where the children were, I and my wife went straight home. I didn't have no time to go around and tell anybody about it.
436 Q. You were in the church attending service when you heard this proclamation?
A. I was just there to hear about what the priest had to say about the children.
Q. Did you know he was going to make a proclamation?
A. Yes, sir.
Q. How did you know that?
A. Because my wife told me the Sunday before.
Q. Your wife attends that church, does she?
A. No, not regular; she goes some times.
Q. Your wife told you what had happened the Sunday before?
A. She told me that the priest told the people at church that day that there were some children to be brought to Clifton, and all those that wanted one of these children to apply next Sunday at the service, and put in their application, together with a dollar; and next Sunday I went to church to see about the matter.
Q. It was your wife told you about what the priest said?
A. Yes sir.
Q. Did the priest say that?
A. No, sir; not the next Sunday.
Q. Then the day you were there the priest didn't say they had to put in a dollar?

A. Yes, sir.

Q. What language did he make the proclamation in?

437 A. Spanish.

Q. Only in Spanish?

A. Yes, sir; he can't talk good enough English to make the proclamation in English.

Q. How long has the priest been there?

A. About a couple of months; two or three months.

By Chief Justice KENT:

Q. Do I understand you to say you were present at the priest's house in Clifton on Saturday evening when the children were given away?

A. Yes, sir; I was.

Q. What time of night?

A. Between, I guess it was about eight o'clock.

Q. How many children were given away?

A. I couldn't tell for certain how many; there were between 15 and 17, I guess.

Q. Did you stay there all the time they were being given away?

A. Yes, sir.

Q. Did you hear what took place?

A. Yes, sir.

Witness excused.

Mr. WALTER BENNETT: We renew our application to introduce the affidavit of Mr. Bull. We desire it for two reasons: In

438 the first place, Mr. Bull testified in his affidavit to matters about which no other witness can testify; in the second place, Mr. Bull's affidavit shows that he himself was present when the children were distributed, and what took place in that house.

Mr. Chief Justice KENT: You have a witness here who has just testified, that was present.

Mr. WALTER BENNETT: This affidavit is as to what took place in Morenci at the time of the distribution of the children; and not at the time of the distribution in Clifton.

(Question argued to the Court by counsel.)

Mr. T. D. BENNETT: The petitioner objects to the introduction of this affidavit, for the reason it is not proper or legal evidence, and on the ground that the action of the priest in the matter was not binding on the asylum.

Mr. IVES: I want to add that the fact that the Court made an informal announcement, is no excuse for the non-attendance of a witness. Frequently in the course of a lawsuit matters develop necessitating the presence of witnesses; and I think careful prudence and diligence in preparing this case would have required them to keep the witness here. I don't think it is in the nature of a case that makes it a surprise, a complete surprise.

Mr. WALTER BENNETT: The only reply we have to that is this: This is not an ordinary lawsuit; this is a question of *habeas corpus*.

It is an extraordinary writ; it is the strong arm of the Court
439 stretched out to do that thing immediately which the slow process of the law has not permitted to be done. It is one of those extraordinary powers of the Court, like mandamus, injunction, and other extraordinary writ; and in the hearing on the return of those writs the customary and usual practice is that they are ordinarily only heard upon affidavits. It is proper and right that the Court may hear oral testimony, but ordinarily and usually these returns are heard only upon affidavits; so that this respondent had the right to believe that this return would be only so heard, and affidavits were so prepared. In this one particular instance, it is the only one—the affidavit of the witness we have here is the only one who did not remain; the others remained, because they are the ones who had the children here. This is not an ordinary proceeding; it is not an ordinary lawsuit; which is ordinarily tried by oral testimony; it is ordinarily tried by affidavit; and the intimation of the Court was that the ordinary course would be pursued.

Mr. Chief Justice KENT: We regret that counsel have been misled at all by any suggestion the Court has made in that respect, but having heard this case upon oral testimony, we think it quite clear that the petitioner would have a right to have the witness before him and cross-examine him on matter that he thinks material in the case. We are inclined to the opinion that this affidavit cannot be received in the case as evidence.

(Respondent excepts to the ruling of the Court.)

Mr. WALTER BENNETT: Now, we desire to introduce in
440 evidence the record of the probate Court, certified copy of the entire record of the Probate Court with reference to the appointment of guardian of the child William Norton, John C. Gatti. The only reason we select the case of John C. Gatti in which to make the answer in this case, was that Mr. McFarland had brought with him from Solomonville a complete copy of the record in that case; but it will further appear upon an examination of this record that the answer filed by the petitioner in this case to the petition of Gatti for the appointment of himself as guardian purports to be an answer for each one of the other minors; so that they really filed their answer in the case as representing all the other minors, even in the Probate Court recognizing that the cases were so corelated that they could all be heard together in one proceeding. Now, this being in writing, I do not care to take the time to read it to the Court, if the Court will take it as a part of the record and examine it. We desire to offer it in evidence.

Petitioner objects to the document, on the ground it appears upon its face that the judgment is a nullity, and the notice of appeal in the record and the bond.

Mr. Chief Justice KENT: We will receive the document for what it may be worth.

(Document filed as Respondent's Exhibit No. 4. Petitioner excepts to the ruling of the Court receiving the document.)

Recess taken until 2 p. m.

441 TUESDAY, *January* 17, 1905—2 p. m.

Mr. WALTER BENNETT: If the Court please, the stipulation which it was suggested by the Court should be drawn and presented, I drew during the intermission, but the stenographer was out and came in just as I came into the courtroom; but it will be here in a few minutes. I have told the gentlemen on the other side the nature of the stipulation I have prepared.

Mr. IVES: That the pleadings and evidence be considered as applicable in all the other cases, and that the judgment be made to conform to the testimony in this case.

Mr. WALTER BENNETT: The stipulation will be here in a few minutes. Now, there are a number of these respondents who have not been placed upon the stand. We could go through the whole list and place them on the stand, with the idea, not of their testifying as to the distribution of the children, but as to their ability to provide for them, and their being fit and proper persons to have the custody of the children. We do not desire, however, to occupy the attention of the Court longer, if the petitioner will admit that they would so testify, if they were put on the stand.

Mr. IVES: That may be conceded.

Mr. WALTER BENNETT: We desire to put on Mr. Gatti for one or two questions, and then Mr. Hill for one or two questions and then we are done.

442 JOHN C. GATTI, the respondent, called as a witness on his his own behalf and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. Where do you reside?

A. Clifton, Arizona.

Q. How long have you resided there?

A. About seven years.

Q. Your name is John C. Gatti?

A. Yes, sir.

Q. You are one of the respondents in this case now on hearing?

A. Yes, sir.

Q. Were you in Clifton at the time this carload or children first came in there?

A. Yes, sir.

Q. Were you at the place where these children were being distributed to the Mexicans by Mr. Swayne and the priest?

A. Yes, sir; I was there about five minutes.

Q. Tell the Court what you saw with reference to the distribution of these children?

A. Why in the evening, it was getting pretty late and I had no supper yet—and previous to that my wife had come over and told me that she had seen a whole lot of pretty children, and she wanted to get one. I told her that was all right; so she started towards the Catholic residence, not the church but the priest's resi-

443 dence, which is only a few feet from the church. I started to go in the front door, and I couldn't get in there, there was

such a multitude of Mexicans, especially women. I found out I couldn't get in through there, and being well acquainted with the father I went around and come the back way. I knocked at the back door and the sexton came over and knew me—"Well," he says, "it's pretty full, but," he says, "you can come in." So I went through there. I came in there, and about that time, in a corner by the window, I saw my wife, and with two or three kids around her; and she had her arms around them too.

Q. Your wife was in there?

A. Yes. My wife says to me, "I can't get no child. Won't you talk to the father?" I says, "All right, if it will do any good I'll speak to the priest." So I went over to the father and spoke to him.

Q. Father what?

A. Mandin. Says I to the father, "What's the matter you don't give my wife a child?" "Why," he says, "I can't very well; they are all engaged;" in fact in French it is, "they are all rendered; they are all signed." That is about what he meant. We spoke in French always. He could speak better French than he could English. That's about all there was to it. And before I came away——

Q. Was there anything said at that time about money
444 being paid to the priest?

A. No, not at that time.

Q. Did you have any conversation with the priest subsequently about the question of money being paid to the priest?

A. Yes, sir; afterwards, that evening after the meeting—they had the meeting, it seems to me, the following day, I recollect something like that said to the father like this: Says I, "This looks pretty bad on you; they're accusing you of obtaining money for these children. What about that?"

Q. What reply did he make to that?

A. He says, "Mr. Gatti, there was a collection taken up," he says, "but what money I got wasn't enough to pay for the hack between Clifton and Morenci." He says, "I am out of my pocket; I am out money on it, on the proposition."

Q. You were present at the time these children were being distributed?

A. Yes, sir; I certainly was. There was a few distributed while I was there; I don't know how many, but three or four. I only stayed there about five minutes. There was such a confusion there, and it seems to me one of the sisters was crying, and I didn't want to stay there any longer.

Q. You have one of these children?

A. Yes, sir. My wife she was excited, too. She wanted one, and was pleading all around; and I told her it was impossible; that I had asked the father already, and he told me there wasn't
445 any. But the father did say if there was any left he would give me one sure, for I had been his friend.

Q. You have one of these children?

A. Yes, sir.

Q. You desire to retain it?

A. Yes, sir.
Mr. IVES: We will admit all that.
Q. Are you a Catholic?
A. Yes, sir.
Q. Can you tell how many of the respondents in these cases who have these children now are Catholics?
A. Not very well; there is a few of them. Mrs. Abram is a Catholic.
Q. Do you know Mr. William Hill?
A. I don't know him.
Q. Henry Hill, I mean?
A. I believe he is a Catholic, because he is always very interested in donating to the church. I know that to be a fact, because it always falls on me to go around.
Q. Do you know Mr. Laskey, as to whether or not he is a Catholic?
A. I know him. I don't know whether he is a Catholic or not.

Cross-examination.

By Mr. IVES:

Q. When you saw these children being distributed, did you
446 see any money being passed?
A. No, sir; I did not.
Q. Do you know how long Father Mandin had been in this country, in the United States—have you heard him say?
A. Yes, sir; he told me had been here about 10 months.
Q. And in Clifton about how long?
A. Oh, about three or four months.
Q. How old a man is he?
A. He must be about 34 or 35.
Q. As old as that?
A. Yes. He is of a very excitable disposition, very nervous
Q. He is a Frenchman?
A. Oh, yes, he is a Frenchman.

Witness excused.

HENRY HILL, recalled as a witness on behalf of the respondent;

Mr. WALTER BENNETT: I am simply going to ask Mr. Hill if he knows how many of these people who now have the children are Catholics?
Mr. IVES: If I care to object to it, I think I could object to it as immaterial. I will let you recall him; you can prove that later.
Mr. WALTER BENNETT: We rest apart from that question.

Witness excused.

447 Respondent rests.

Mrs. JOHN C. GATTI, recalled as a witness on behalf of the petitioner, testified further as follows:

Examined by Mr. IVES:

Q. You testified that you were present during a large part of the time when the children were being distributed at Clifton?
A. I was in there.
Q. For quite a long time?
A. I was there until about 13 or 14 children was given away.
Q. Did you see any money passed?
A. I did not, sir.

Witness excused.

Sister ANNA MICHELLA, recalled as a witness on behalf of the petitioner, testified further in rebuttal as follows:

Examined by Mr. IVES:

Q. In the bringing out and distributing of children in this instance, who was in control, yourself or Mr. Swayne?
A. I was in control.
Q. If there was any difference of opinion between Mr. Swayne and yourself, you had the authority to decide?
A. Yes, sir; I was the one who had authority.

Q. As between yourself and Father Mandin, who had the
448 authority to decide.

A. Our Sister Superior was the one who had given the orders to him.

Q. It has been testified that you very reluctantly gave these children to the Mexicans, both at Clifton and Morenci. Now you being in control, and you being there, as has been testified, to give these children to the Mexicans, why did you give them?

A. Well, my motive in allowing the action to go on was because the children had been assigned from the hospital to Father Mandin, and while I did not myself approve of the appearance of the people, I thought it would be probably better to wait, as long as we were going to visit the homes, and see for myself, in order to send whatever report was necessary to the hospital; that I wouldn't be acting entirely on my own judgment and from what I had seen myself; but from the very outset I wasn't impressed with the people and had told Father that; but he told me I was very hard to please and out of respect for him I thought it more advisable to wait and see for myself; which, of course, I didn't have an opportunity to do.

Q. If you had known that these homes were of the character as has been testified to here, would you have delivered these children to the people?

A. No, sir; not under any circumstances.

Respondent objects to the question, as irrelevant and im-
449 material, as the motives of this witness or the institution are not impugned. Objection overruled by the Court, and respondent excepts to the ruling.

Witness excused.
Petitioner rests.

Mr. WALTER BENNETT: With the exception of the fact that I want to show by Mr. Hill, we are ready to rest.

Mr. Chief Justice KENT: Where is he?

Mr. WALTER BENNETT: Will it be admitted that six of these people who now have the children are Roman Catholics?

Mr. IVES: I think on cross-examination I can prove no one of them go to church there. I don't know whether that is true or not. They may call themselves Roman Catholics, but I would not make any admission that their Catholicity is of such a nature as would warrant these children being brought up by them as in the Catholic church.

Mrs. GRACE LASKEY, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. You reside in Clifton?
A. No, sir; I reside in Morenci, Arizona?
Q. Have you any of the children?
A. Yes, sir; I have a boy.
450 Q. What is the name of the boy?
A. His name was Ambrose Lamm.
Q. To what church, if any, do you belong?
A. I belong to the Catholic church.

Cross-examination.

By Mr. IVES:

Q. Do you go to your religious duties in the Catholic church regularly?
A. I do.
Q. Go to mass every Sunday?
A. I can't say I go every Sunday, but I go to mass enough to be in good standing in the church.
Q. Have you been to confession within a year?

Respondent objects to the question.

Mr. WALTER BENNETT: The purpose of this question is to show that in the action of the citizens of Clifton in regard to these children there was no sectarian purpose; that there was no purpose to take these children from Catholic control and to deliver them to Protestant control.

Mr. IVES: I will admit that of record.

Mr. WALTER BENNETT: That at least six of these people owe their allegiance to the Catholic church?

Mr. IVES: I will admit that there was actually no thought of religion in the action of the people at Clifton; but in case the other question should be material, as I offered my suggestion as to
451 their being two other foundling asylums in the city of New York, then I should have a right to cross-examine on this ground.

Mr. Chief Justice KENT: If it is material to show that they were

people of the Catholic faith, certainly counsel on the other side have the right to cross-examine on that point.

By Mr. IVES:

Q. Have you been to confession within a year?
A. No, sir.

Witness excused.

HENRY HILL, recalled as a witness on behalf of the respondent, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. Are you a Catholic?
A. Yes, sir.
Mr. IVES: How long since you have been to confession?
A. I don't know.

Witness excused.

Mr. IVES: I will let my admission stand, that I don't make any contention that the people of Clifton were actuated by any religious motive whatever. Now, if the Court please, the respondent having rested his case with the exception of calling Mr. Hill, and
452 Mr. Hill having been called and testified, is it proper for them to call all these witnesses again on this point?

Mr. Chief Justice KENT: We think, if the testimony is going to stand as to these two witnesses, that the respondent will be entitled to examine all of them on that point. Either it should all be stricken out, or they should be permitted to put in all their testimony on that point.

Mr. IVES: I should suggest that the testimony of the lady that preceded Mr. Hill be stricken out. Mr. Bennett suggested he wanted to examine Mr. Hill on this question, and he examined him. Now why should this time be wasted with this useless testimony?

Mr. WALTER BENNETT: It is my purpose solely to show the number of these respondents who are Catholics. I thought I could do it by Mr. Hill, but the cross-examination developes that the counsel desires to show if they have been to confession within a year. If that be true, how, then, can I prove the whole matter by Mr. Hill?

Mr. Chief Justice KENT: Proceed.

J. T. KELLY, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Q. Are you one of the respondents in this case who have one of these children?
A. Yes, sir.
Q. To what church do you belong?
453 A. The Catholic church.

By Mr. IVES:

Q. How long since you have been to confession?

A. How long since I have been to confession?
Q. Yes, sir.
A. Oh, probably three or four years.

Witness excused.

Mrs. MARY QUINN, called as a witness on behalf of the respondent and duly sworn, testified as follows:

Examined by Mr. WALTER BENNETT:

Q. What is your husband's name?
A. Hugh Quinn.
Q. He is one of the respondents in this inquiry?
A. He is.
Q. Have you and Mr. Quinn one of the children that were distributed in Clifton?
A. Yes, sir.
Q. To what church do you belong?
A. To the Catholic church.

By Mr. IVES:

Q. How long since you have been to confession?
A. It has been a year and past.
Q. It has been more than a year?
454 A. Yes, sir.

Witness excused.
Respondent rests.

Sister ANNA MICHELLA, recalled as a witness on behalf of the petitioner, in sur-rebuttal, testified further as follows:

Examined by Mr. IVES:

Q. How many years have you been a Roman Catholic—have you been a Roman Catholic for a long time?
A. All my life.
Q. Are you familiar with the tenets of the Roman Catholic religion?
A. Yes, sir.
Q. Will you please state whether or not it is a fact if one does not go to confession once a year they are ex-communicated from the Catholic church?
A. Well, one belonging to the Roman Catholic church, in order to be a recognized member, must approach the sacraments at least once a year.
Q. And confession is one of the sacraments?
A. Yes, sir.
Mr. Justice SLOAN: How can such a one be reinstated—by going to confession?
A. Yes, sir.

455 By Mr. WALTER BENNETT:

Q. Then does one cease to be a Roman Catholic by ceasing to go to confession once a year?

A. They are not a recognized member, and should they be ill and so on, unless they ask for a priest to look after their spiritual wants, they would not be a recognized member at all; unless they would receive the sacraments at least once a year.

Q. In other words, they would not be a member in good standing in the church?

A. No, sir.

Mr. IVES: Would they be allowed burial in a Catholic cemetery?

A. No, sir.

Witness excused.

Petitioner rests.

(Stipulation presented by counsel for the respondent, as to evidence, etc., in this case being considered as taken in all the other cases; and after being filed by the respective counsel, the same was filed with the Clerk.)

Mr. T. D. BENNETT: We understand that each and every one of these children is present and in court; or every one of them has responded to the writs?

Mr. MCFARLAND: Yes, sir.

456 The case was thereupon argued to the Court by the respective counsel, and submitted to the Court for its decision.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

I, Willis N. Tiffany, herby certify that I am the Official Reporter for the District Court of the Third Judicial District of the Territory of Arizona; that I was employed by both parties to the above-entitled cause to phonographically report the oral testimony and proceedings before the Supreme Court of Arizona on the hearing on the return to the writ of *habeas corpus* in said cause; that I did so report said proceedings and testimony as presented to said Court at Phœnix, Arizona, on January 14, 16, & 17, 1905; and that the foregoing (263 pages) is a full, true and correct report of said proceedings and testimony, as phonographically reported by me and transcribed from my shorthand notes to the best of my skill and ability.

In witness whereof, I have hereunto set my hand at Phœnix, Arizona, this 25th day of January, A. D., 1905.

W. N. TIFFANY, *Reporter.*

457 (Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. In the Matter of the Application of the New York Foundling Hospital, a corporation, for a Writ of *Habeas Corpus.* John C. Gatti, Respondent. Reporter's Transcript. Filed March 27, 1905. S. M. Cullom, Clerk.

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George W. Swayne	251	271
Neville Leggatt	290	293
Miss Marian Taylor	301	304
Mrs. John C. Gatti	447	
Witnesses on Behalf of Respondent:		
Mrs. Laura Abram	308	319
" Muriel Wright	320	327
" C. F. Pascoe	330	335
" C. C. Reed	336	342
" Louisa Gatti	343	351
H. B. Rice	353	356
T. J. Simpson	356	369
Neville Leggatt	374	382
L. J. Dunagan	388	394
George Frazier	395	404
Mrs. Olive Freeman	406	
Mrs. Mary Simpson	410	
" Rebecca Tong	414	
Henry Hill	419, 451	422
Eugene Fountin	422	432
John C. Gatti	442	445
Mrs. Laskey	449	455
T. J. Kelly	452	
Mrs. Mary Quinn	453	

459 *Statement of Costs.*

In the Supreme Court of the Territory of Arizona.

In the Matter of the Application by THE NEW YORK FOUNDLING HOSPITAL, a Corporation, for a Writ of *Habeas Corpus.*

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI and Sixteen Others, Respondents.

To the Clerk of said Court and T. D. Bennett and Eugene S. Ives, attorneys for Petitioner:

In compliance with Section 1557, Revised Statutes of Arizona, 1901, you and each of you are hereby notified that the respondents

claim as costs in the above-entitled cause the sum of $791.80 for the following expenses and disbursements incurred by them, viz:

Fees of Clerk of Supreme Court					$7.
One-half Stenographer's per diem					15.
Witness fees.			Miles travel.		
Chas. Bull	2	days	362		57.30
Eugene Fountain	12	"	355		71.25
B. Martinez	12	"	355		71.25
Mrs. J. C. Gatti	12	"	355		71.25
Mrs. S. Abrams	12	"	355		71.25
Mrs. H. Wright	12	"	355		71.25
Mrs. C. F. Pascoe	12	"	355		71.25
Mrs. Chas. Freeman	12	"	355		71.25
Mrs. C. C. Reed	12	"	355		71.25
Mrs. Laskey	12	"	355		71.25
Mrs. Geo. Frazier	12	"	355		71.25
Total					$791.80

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W. C. McFARLAND &
BENNETT & BENNETT,
Attorneys for Respondents.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

Walter Bennett, being duly sworn, on oath says that he is one of the attorneys for the respondent in the above-entitled cause; that all the witnesses above-named, for whose attendance and mileage claim is made were necessary and material witnesses for the respondents at the trial of said cause, and were actually in attendance upon the Court upon the days for which a per diem is charged and are entitled to attendance and mileage as therein stated.

——— ———.

Subscribed and sworn to before me this 21st day of January 1905.

——— ———.

(Endorsed:) No. 209. In the Supreme Court of Arizona. New York Foundling Hospital, Petitioner, *vs.* John C. Gatti & 16 others, Respondents. Statement of costs. Filed Jan. 23, 1905. S. M. Cullom, Clerk.

461 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered

from 1 to 460, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the Matter of the Application of the New York Foundling Hospital, a corporation, for a Writ of *Habeas Corpus*, as the same remain of record and on file in said office.

I further certify that the citation attached hereunto, is the original citation issued by said Supreme Court of the Territory of Arizona, in said cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this 20th day of April, A. D. 1905.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

462 In the Supreme Court of the United States.

In the Matter of the Application of THE NEW YORK FOUNDLING HOSPITAL for Writ of *Habeas Corpus*.

Citation.

The United States of America to John C. Gatti:

You are hereby cited and admonished to be and appear at the session of the Supreme Court of the United States to be holden in the city of Washington, District of Columbia, on the 22 day of March, 1905, pursuant to an appeal duly allowed by the Honorable Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona on the 21″ day of January, 1905, and duly filed with the Clerk of the said court upon said day from an order rendered in the Supreme Court of the Territory of Arizona on the 21″ day of January 1905, in a *habeas corpus* proceeding originally brought in said Supreme Court of the said Territory, wherein you were respondent and the said New York Foundling Hospital was petitioner, and which said order dismissed the petition for a writ of *habeas corpus*, and that you do then and there show cause, if any there be, why the said order rendered against the said petitioner and in your favor, should not be set aside, reversed, corrected, and why speedy justice should not be done to the party in whose behalf the said appeal is allowed and the prayer of the said petition granted.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21″ day of January, 1905.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

463 PHOENIX, ARIZONA.

The undersigned, attorneys for the respondent, John C. Gatti, In the Matter of the Application of the New York Foundling Ho-

pital for Writ of *Habeas Corpus*, do hereby acknowledge service of the citation on appeal to the Supreme Court of the United States in said cause; said citation having been issued by the Supreme Court of the Territory of Arizona, on the 21st day of January, 1905.

We authorize this acceptance of service to be attached to the original citation on file, and hereby waive any other service of citation.

Witness our hands this 24th day of January, 1905.

W. C. McFARLAND,
BENNETT & BENNETT,
Attorneys for Respondent, John C. Gatti.

463½ [Endorsed:] No. 209. In the Supreme Court of the Territory of Arizona. New York Foundling Hospital *vs.* John C. Gatti. Acknowledgment of Service of Citation. Filed Jan. 24, 1905. S. M. Cullom, Clerk.

464 [Endorsed:] No. 209. In the Supreme Court of the United States. In the Matter of the Application of the New York Foundling Hospital for a Writ of *Habeas Corpus*. Citation. Filed Jan. 21, 1905. S. M. Cullom, Clerk.

465 In the Supreme Court of the Territory of Arizona.

Habeas Corpus.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

Statement of Facts.

In the above-entitled proceeding, the Court finds the facts in the case to be as follows:

I.

The petitioner for the writ of *habeas corpus* is a corporation organized and existing under and by virtue of a special act of the legislature of the state of New York, and deriving its powers from an act of the said legislature of the state of New York amending its charter; which last mentioned act is attached to the petitioner's petition for the writ of *habeas corpus* herein.

II.

For many years past it has been the practice of the petitioner to place infants of suitable age in homes within and without the state of New York, to be cared for, reared, supported, and educated in such homes by the persons to whom they are given, and it so places some four hundred and fifty children each year. The hos-
466 pital authorities retain the right to visit such homes, and to maintain a supervision over such children until they become

of age, but the nature or extent of such supervision, and the method by which it is exercised do not appear from the evidence.

III.

Petitioner has never filed copies of its charter or articles of incorporation, or any appointment of an agent resident within this territory, with the territorial auditor.

IV.

On or about the 4th day of October, 1902, the child William Norton was born in said hospital out of wedlock, and was placed in the charge of said hospital by its mother, and the hospital authorities thereupon took said child into its care, custody and management.

V.

In the latter part of September, 1904, the authorities of said hospital, upon the written request of a Catholic priest, who was unknown to them but who was temporarily in charge of a parish including the towns of Clifton and Morenci, in Graham county, Arizona, sent forty children, including the child William Norton, from the hospital to Clifton to be placed for adoption in the homes of the parishioners of said priest. These children were so sent upon representations by the said priest that they would be placed for that purpose in the homes of reputable English-speaking Spanish people who had no children of their own and who desired children
467 of fair complexion. Children of fair complexion were sent, all of them being of the Caucasion race, of unusual beauty and attractiveness. The children were about evenly divided as to sex, and ranged from eighteen months to five years in age, the child William Norton being just two years old. The children arrived at Clifton in a special car in charge of Sister Anna Michella, two other Sisters of Charity, and one Swayne, an agent of the hospital all being subordinate in authority to Sister Anna Michella. Attached to the clothing of each child was a tag, giving the name and age of the child, its band number, and the name of the Mexican-Indian to whom it was consigned—the person to whom each child was to be delivered having been arranged between the hospital authorities and the local priest before the children left New York. The names of the children distributed at Clifton, their several consignees, and the names of the respondents who now have the children in their possession, are as follows:

Name of child.	*Consignee.*	*Present guardian and respondent.*
Gabriella Welsh	Nazario Mendoza	Hugh Quinn.
Edward Gibson	Paula Nunez	Jas. E. Hargis.
George Webber	Refugio Leyona	Geo. W. High.
William Norton	Santos Gonzales	John C. Gatti.
Raymond Spencer	Patricio Ortega	Mrs. Rose Hill.
Ambrose Lamb	Maria Espinola	James Edgerton.
Pearl Kendrick	Maria Espinola	W. H. Cooper.
Jerome Shanley	Marguerita Espinola	C. F. Pascoe.
Katherine Fitzpatrick	Marguerita Espinola	Harry Wright.
Joseph Ryan	Ramon Bailes	C. C. Reed.
Violet Lambick	Josefa Carrion	Rebecca H. Long.
Sadie Green	Josefa Villeseas	Mrs. Olive Freeman.
Elizabeth Kane	Refugio Apodoco	Sam Abrahams.
Marie Mack	Bergrado Garcia	John C. Tyler.
Anna L. Doherty	Abigai Valleseas	Thomas Simpson.

468 The following are the children delivered by Swayne to the deputy sheriff at Morenci to be distributed to American residents:

Name of child.	*Consignee.*	*Present guardian and respondent.*
Hannah Kane	Concepcion Ayala	John Doe.
Edward Conisky	Marcienana Cadena	J. F. Kelley.

To each person to whom a child was assigned was sent a letter, signed by the sister superior, requesting that the consignee, within a week after the reception of the child, fill out a blank which was enclosed, containing the name of the child, the name of the foster parents in full, the business occupation and the post-office address of such foster parents, and forward the same to the hospital authorities. The letter also requested that the person to whom each child was assigned should write yearly, about the first of May, how the child was progressing, and give other items of interest.

VI.

Upon the arrival of the special car at Clifton on the evening of October 1, 1904, fifteen of the children, who had been consigned to the priest's parishioners at Clifton, were taken from the car to the priest's house, and there, the same evening, in the presence of Sister Anna Michella, in charge, the other Sisters of Charity accompanying her, and the agent Swayne, were delivered by the priest to the persons to whom they were consigned. The remaining there distributed in the same manner and to the same class of children were then taken to Morenci, nine miles from Clifton, and people.

469 VII.

The persons to whom the children were consigned and delivered, both in Clifton and Morenci, were, with one or two exceptions, the

lowest class of half-breed Mexican-Indians, dark skinned, of low and filthy habits of life, vicious, unacquainted with the English language, and, in several cases, prostitutes and persons of notoriously bad character. Their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs, and many of them had children of their own whom they were unable to support, and were entirely unfit to have the care, custody, control and education of white Caucasian children. No visit to or examination of the homes of these people was made at any time, either by the agent, Swayne, the Sisters in charge, or any one on behalf of the petitioner.

VIII.

On October 2nd, the day after the distribution of the children at Clifton, the facts became known to the American citizens of the place and much indignation was aroused. A committee of influential citizens, including the deputy sheriff, was appointed to wait on the Sisters of Charity and Agent Swayne, who were then at Morenci, and acquaint them of the character of the persons to whom the children had been delivered in Clifton, and with the intense indignation of the citizens. This committee, with Mr. Mills, the superintendent of the copper company operating at that place and one of the leading
470 citizens of the town, met the agent, Swayne, who assumed to be in authority, and in response to their representations he told the committee that he knew his business and did not propose to be dictated to by the people; that "the children had been placed and would stay placed." These statements of the agent, Swayne, were then communicated to the Clifton people by the committee, by telephone, in response to which a committee of twenty-five reputable white citizens was appointed to collect the children left with the half-breed Mexican Indians at Clifton, and to bring them to the principal hotel of the place. The members of this committee then went to the several Mexican-Indians' huts where the children were, and upon their statement to the occupants that they were sent by the American citizens to take the children from their possession, the children in each instance, without protest, were voluntarily given up to the committee and taken to the hotel.

IX.

Upon the arrival of the train in Clifton, all the children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from the Mexican-Indians, they were in a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects of coarse Mexican beans, chilis, watermelons, and other improper food which had been fed them, and in some instances from the effects of beer and whisky that had been given them to
471 drink. Upon the arrival of the children at the hotel, certain good women of the place took charge of them, nursed them, and secured medical care and attention for them. On the next day the children were distributed among the several respondents in these cases, who have since had them in their care, custody and control.

X.

The agent Swayne returned to Clifton with the committee, where his refusal to take the children from the Mexican-Indians, upon being informed of their character, and his conduct and bearing had aroused intense indignation among the American citizens. Some threats of a general character were made by certain persons present against him, but no violence was offered him. He protested against the taking of the children from the Mexican-Indians by the American residents, and neither by his consent, nor that of the Sisters, were the children either taken from the Mexican-Indians with whom they had been placed by the priest and Swayne, or placed by the American citizens with the respondents.

XI.

In Morenci the distribution of the remaining children among the half-breeds, Mexican-Indians, aroused the same feeling of indignation among the American people as at Clifton. After the return of the agent Swayne to Morenci, Mr. Mills, the superintendent of the copper company operating at that place, with other reputable and prominent citizens, called upon the Sisters and the agent, Swayne, and remonstrated with them against permitting the children to remain
472 with the people to whom they had been distributed. As a result of these remonstrances and a statement by Mr. Mills that the American citizens would not suffer the children to so remain, the priest and the agent Swayne took the children from the half-breed Mexican-Indians to whom they had been delivered by them, and returned with them to New York, with the exception of three, who were delivered by Swayne to the deputy sheriff to be distributed among the American residents in Morenci.

XII.

Each of the respondents is a fit and proper person to have the care, custody, control and education of the children. They are in every case people of sufficient means properly to care for and educate the children, and in every case they are fit persons by reason of their character, standing, and age, to have and maintain such care, custody and control. Without exception, they have become greatly attached to the children and the children to them; and each respondent desires to retain the possession of the child which he has, in order that he may rear it as one of his own family. We further find that it would be detrimental to each of said children to take it from the custody of the respondent who now has it in his care, and that the best interests of said children will be subserved by permitting it to remain in the custody and control of the respondent who now has it in his care.

XIII.

On the 16th of October, applications were made by each of
473 the respondents to the probate court of Graham county, Arizona, for letters of guardianship of the person of the child

which each possessed. Hearings were had, at which this petitioner was represented by counsel, and in each instance letters of guardianship were granted in accordance with said application, and each of said respondents duly qualified as such guardian. Thereupon this petitioner took an appeal from the order granting said letters of guardianship in each case to the district court of Graham county. Pending said appeals these petitions were filed, and in response to the writs the children were brought before this court.

Approved, allowed and certified as Statement of Facts herein Dated Phœnix, April 8th, 1905.

EDWARD KENT,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. New York Foundling Hospital, Petitioner, *vs.* John C. Gatti, Respondent. Statement of Facts. Filed May 9, 1905. S. M. Cullom, Clerk.

474 In the Supreme Court of the Territory of Arizona.

NEW YORK FOUNDLING HOSPITAL, Petitioner,
vs.
JOHN C. GATTI, Respondent.

Stipulation.

The Statement of Facts found by the Supreme Court of Arizona in *and* above-entitled cause having been inadvertently omitted from the record of said cause in said court at the time the transcript of said record was transmitted by the Clerk of said Court to the Supreme Court of the United States,

It is hereby stipulated That the Clerk of the Supreme Court of the Territory of Arizona shall make a certified copy of said Statement of Facts and transmit the same to the Supreme Court of the United States, and that the same shall have the same force and effect as if filed in the office of the Clerk of the Supreme Court of Arizona prior to the transmission of said transcript and transmitted therewith.

EUG. S. IVES,
Attorney for Petitioner and Appellant,
BENNETT & BENNETT,
Attorneys for Respondent and Appellee.

(Endorsed:) No. 209. In the Supreme Court of the Territory of Arizona. New York Foundling Hospital, Petitioner, *vs.* John C. Gatti, Respondent. Stipulation. Filed May 11, 1905, S. M. Cullom, Clerk.

475 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing to be a full, true and correct copy of the Statement of Facts approved and allowed by Hon. Edward Kent, Chief Justice of said Supreme Court of Arizona, in the case of the New York Foundling Hospital against John C. Gatti, and filed in this office on the 9th day of May A. D., 1905, and of the Stipulation signed by attorneys for Petitioner and Respondent in said above entitled cause, and filed in this office on the 11th day of May, A. D., 1905, as the same remain of record and on file in this office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court, at Phœnix, Arizona, this 12th day of May, A. D., 1905.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

476 [Endorsed] File No. 19,755. Supreme Court U. S. October Term, 1904. Term No. 655. The New York & Foundling Hospital App'l't *vs.* John C. Gatti. Addition to record. Filed May 17", 1905.

Endorsed on cover: File No. 19,755. Arizona Territory Supreme Court. Term No. 258. The New York Foundling Hospital, Appellant, *vs.* John C. Gatti. Filed May 10th, 1905. File No. 19,755.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 26 1906
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER 10, 1905.

No. 21

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,

vs.

JOHN C. GATTI,
Respondent.

BRIEF FOR APPELLANT.

D. CADY HERRICK,
CHARLES E. MILLER,
WILLIAM C. TRULL,
Of Counsel for Appellant.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

To be argued by
D. CADY HERRICK.

Supreme Court of the United States.

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,

vs.

JOHN C. GATTI,
Respondent.

Brief for
Appellant.

No. 258.
Oct. 10, 1905.

Statement of Facts.

This is an appeal from an order of the Supreme Court of the Territory of Arizona, dismissing a writ of Habeas Corpus, obtained by the appellant for the purpose of securing the custody and control of one William Norton, an infant of the age of two and one-half (2½) years, and remanding the said William Norton to the custody and control of the respondent. (Page 40.)

The appellant is a corporation duly incorporated under the laws of the State of New York (pages 32-37), and is authorized by its act of incorporation to receive, keep and take into its care, charge, custody and management, children, who are abandoned, or children born out of wedlock, who by consent of the mother may be intrusted to such corporation.

Laws of New York, 1872, Chap. 635, Record p. 12, fols. 27-28.

The material portions of the Act of 1872 (*supra*) are as follows:

SECTION 1.—The Foundling Asylum of the Sisters of Charity of the City of New York, a corporation created, organized and acting under and by virtue of the laws of this State, are hereby authorized and empowered to receive and keep and take under its care, charge, custody and management, the following children or persons:

1. Children of the age of two years or under, found in the City of New York, abandoned or deserted, as hereinafter mentioned and specified.

2. Children of the like age, whose father or mother is dead and whose surviving parent is for any cause unable to maintain them, and who, by consent in writing of such surviving parent, may be entrusted to such corporation.

3. Children of like age, born out of wedlock, who, by the consent of the mother, may be entrusted to the said corporation; which class shall also include children, whether born in wedlock or not, left in the crib or other receptacle of the said corporation for foundlings.

4. Children of like age, having no parent living, and who, by consent in writing of their guardian, or nearest relative of full age, may be entrusted to said corporation.

5. Children of like age, who may be transferred and entrusted to said corporation by the commissioners of public charities and correction of the City and County of New York.

6. The said corporation may also, with a view to health and nourishment of the child and reformation of the mother, receive temporarily the mother of any such child, born out of wedlock, committed or entrusted as aforesaid, and discharge her; provided always, that such mother shall not be received or detained except on her own request, and by and during her free will and consent.

SEC. 2.—Children entrusted to said corporation by the voluntary act of their parents, guardian or nearest relatives, as hereinbefore provided, shall be deemed to be in the lawful charge and custody of said corporation. Such entrusting shall be made and evidenced by an instrument in writing in form substantially as follows, viz.:

SEC. 11.—Whenever any child, properly chargeable upon the fund placed by law at the disposal of the commissioners of emigration, shall agreeably to the provisions of this act, be entrusted to and supported and maintained by the said corporation, the said corporation shall be entitled to receive from the fund the sum of sixty, seventy-five, or one hundred dollars per annum (according to the age of such children respectively), and proportionally for any portion of a year for every such child; provided, however, that in no case shall the sum so to be received exceed the lowest cost of the support and government of a child of a like age in any of the public institutions at present under the care of the commissioners of public charities and correction of said City and County of New York.

SEC. 12.—In each and every year, after this act shall take effect, the board of supervisors of the City and County of New York shall levy and collect by tax, at the same time and in the same manner as the contingent charges and expenses of the

City and County are levied and collected, and pay over to the said corporation such a sum per week, for every infant under eighteen months of age, as the commissioners of charities and corrections shall certify to have been expended during the last previous fiscal year in the care and provision for the infants per week each, in the infants' hospital, which is under the control of the said commissioners; and for every child over the age of eighteen months, such a sum per year in monthly payments, as the said commissioners shall certify to have been expended as an average cost for maintenance and hospital care of each child for a full year at the institution known as the nursery for children, on Randall's Island, in the last previous fiscal year, as shown and reported by the said commissioners. (fols. 27-29, 33-35.)

It will be observed that by Sections 11 and 12 (*supra*) authorizing the appellant to receive and keep under its care and control such children, provision is made for compensation for such services out of the public funds provided by the State of New York. It is further provided by statute that any child which the appellant has under its care and custody, it may, by the general laws of the state, place out for adoption.

Laws of New York, 1884, Chap. 438, Secs. 5, 7.

The sections read as follows:

"SEC. 5.—Any corporation specified in the first section of this act may bind out any indigent or pauper child, if a male, for a period which shall not be beyond his twenty-first year, and if a female, for a period which shall not be beyond her eighteenth year, which shall have been absolutely surrendered to the care and custody of such corporation in pursuance of the provisions of the first section of this act, or which shall have been placed

therein as a pauper in pursuance of the provisions of the second section of this act, or which shall have been left to the care of such corporation with no provision by the parent, relative or legal guardian of such child, for its support for a period of one year then next preceding, to be a clerk, apprentice or servant, by an indenture in writing, which shall be executed under seal and signed in the name of such corporation by such officer or officers thereof as shall be authorized by the directors or trustees thereof to sign such corporate name to such indentures, and shall be signed also by the person or persons to whom such child shall be so bound out, who shall, in such indenture, undertake to treat such child kindly, which binding shall be as effectual as if such child had bound himself or herself with the consent of his or her father. The provisions of sections eight, nine and ten of article first of title fourth of chapter eight of part second of the Revised Statutes shall apply to all cases of binding under this act."

"SEC. 7.—Any child which a corporation specified in the first section of this act is, by the fifth section of this act, authorized to bind out may be placed by such corporation, by adoption, with some suitable person or persons, by a written instrument of adoption, which shall be executed under seal and signed in the corporate name of such corporation by such officer or officers as shall be authorized by the directors or trustees thereof to sign such corporate name to such instruments, and which shall also be signed by the person or persons with whom such child shall be so placed by adoption, and if either of the persons so taking such child by adoption shall then have a husband or wife from whom such person is not lawfully separated, such instrument of adoption shall also be signed by such husband or wife. When practicable, all such chil-

dren shall be indentured, bound out and given for adoption to persons of the same religious faith as the parents of such children." In June 1891, by the order of the Supreme Court of the State of New York, the name of the appellant was changed from the Foundling Asylum of the Sisters of Charity in the City of New York to The New York Foundling Hospital. (Fol. 78-80.)

William Norton is a child who was born out of wedlock and surrendered by the mother to the custody of the appellant (page 68, fol. 144).

The Supreme Court of Arizona found in substance the following facts (pages 225-30):

For many years past it has been the practice of the petitioner to place infants of suitable age in homes within and without the State of New York, to be cared for, reared, supported, and educated in such homes by the persons to whom they were given, and it so places some four hundred and fifty children each year. The hospital authorities retain the right to visit such homes, and to maintain a supervision over such children until they become of age, but the nature or extent of such supervision, and the method by which it is exercised do not appear from the evidence.

In September, 1904, the authorities of the hospital, upon the written request of a priest who was in charge of a parish including the towns of Clifton and Morenci, in Graham County, Arizona, sent forty children, including the infant William Norton, from its hospital to Clifton, to be placed for adoption in the homes of parishioners of the priest. It was represented that they would be placed for that purpose in the homes of reputable, English speaking Spanish people, who had no children of their own, and who desired children of fair complexion. Children of fair complexion were sent, all of them being of the Caucasian race, about evenly divided as to sex and ranging from eighteen months

to five years of age. Attached to the clothing of each child was a tag giving the age and name of the child, and the name of the person to whom it was consigned.

To each person to whom a child was assigned was sent a letter, signed by the sister superior, requesting that the consignee, within a week after the reception of the child, fill out a blank which was enclosed, containing the name of the child, the name of the foster parents in full, the business occupation and the post office address of such foster parents, and forward the same to the hospital authorities. The letter also requested that the person to whom each child was assigned should write yearly, about the first of May, how the child was progressing, and give other items of interest.

Upon the arrival of the special car at Clifton, on the evening of October 1, 1904, fifteen of the children who had been consigned to the priest's parishioners at Clifton, were taken from the car to the priest's house, and upon the same evening, in the presence of Sister Anna Michella, who was in charge of the children and the other Sisters of Charity accompanying her, and the Agent Swayne, were delivered by the priest to the persons to whom they were consigned. The remaining children were then taken to Morenci, nine miles from Clifton, and there distributed in the same manner and to the same class of people.

The persons to whom the children were consigned and delivered, both in Clifton and Morenci, were, with one or two exceptions, the lowest class of half-breed Mexican Indians, dark skinned, of low and filthy habits of life, vicious, unacquainted with the English language, and, in several cases, prostitutes and persons of notoriously bad character. Their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs, and many of them had children of their own whom they

were unable to support, and were entirely unfit to have the care, custody, control and education of white Caucasian children. No visit to or examination of the homes of these people was made at any time, either by the agent, Swayne, the Sisters in charge, or any one on behalf of the petitioner.

On October 2d, the day after the distribution of the children at Clifton, the facts became known to the American citizens of the place and much indignation was aroused. A committee of influential citizens, including the deputy sheriff, was appointed to wait on the Sisters of Charity and Agent Swayne, who were then at Morenci, and acquaint them with the character of the persons to whom the children had been delivered in Clifton, and with the intense indignation of the citizens. This committee, with Mr. Mills, the superintendent of the copper company operating at that place and one of the leading citizens of the town, met the agent, Swayne, who assumed to be in authority, and in response to their representations he told the committee that he knew his business and did not propose to be dictated to by the people; that "The children had been placed and would stay placed." These statements of the agent, Swayne, were then communicated to the Clifton people of the committee, by telephone, in response to which a committee of twenty-five reputable white citizens was appointed to collect the children left with the half-breed Mexican Indians at Clifton, and to bring them to the principal hotel of the place. The members of this committee then went to the several Mexican Indians' huts where the children were, and upon their statement to the occupants that they were sent by the American citizens to take the children from their possession, the children in each instance, without protest, were voluntarily given up to the committee and taken to the hotel.

Upon the arrival of the train in Clifton, all the

children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from the Mexican Indians, they were in a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects of Mexican beans, chilis, water melons, and other food which had been fed them, and in some instances from the effects of beer and whiskey that had been given them to drink. Upon the arrival of the children at the hotel, certain good women of the place took charge of them, nursed them, and secured medical care and attention for them. On the next day the children were distributed among the several respondents in these cases, who have since had them in their care, custody and control.

The agent Swayne, returned to Clifton, with the committee, where his refusal to take the children from the Mexican Indians, upon being informed of their character, and his conduct and bearing had aroused intense indignation among the American citizens. Some threats of a general character were made by certain persons present against him, but no violence was offered him. He protested against the taking of the children from the Mexican Indians by the American residents, and neither by his consent, nor that of the Sisters, were the children either taken from the Mexican Indians with whom they had been placed by the priest and Swayne or placed by the American citizens with the respondents.

In Morenci, the distribution of the remaining children among the half-breeds, Mexican-Indians, aroused the same feeling of indignation among the American people at Clifton. After the return of the agent Swayne to Morenci, Mr. Mills, the superintendent of the copper company operating at that place, with other reputable and prominent citizens, called upon the Sisters and the agent Swayne, and

remonstrated with them against permitting the children to remain with the people to whom they had been distributed. As a result of these remonstrances and a statement by Mr. Mills that the American citizens would not suffer the children to so remain, the priest and the agent Swayne, took the children from the half-breed Mexican-Indians to whom they had been delivered by them and returned with them to New York, with the exception of three, who were delivered by Swayne to the deputy sheriff to be distributed among the American residents in Morenci.

The persons in Morenci and Clifton amongst whom the children had been distributed were severally appointed guardians of such children by the Probate Court of Graham County. The respondent John C. Gatti being appointed guardian of William Norton.

Demand was made by the officials of the appellant upon Gatti to deliver possession of the child to them, which he refused to do.

Other facts will be referred to hereafter.

Habeas corpus proceedings were forthwith instituted in the Supreme Court of the territory of Arizona by the appellant to recover possession of the child. The hearing was held before the full bench of the Supreme Court, witnesses were sworn and evidence taken and an opinion written, in which all the members of the Court concurred; and findings of fact made, the substance of which has been above set forth.

The Court, in substance held, that neither party had a legal right to the custody of the child, but felt that for its own best interests, no change should be made in its custody; that it was best for it to remain, in the language of the Court, "In the changing West, the land of opportunity and hope,"

and it is from that decision that this appeal is taken.

While the Record in this case is only entitled in a single proceeding, there were in fact, many other proceedings and by stipulation it was agreed that all pleadings filed and testimony taken in this cause should be taken, applied to and considered by the Court as filed, taken and applied in each of the other cases. (Record, p. 39.)

Pending the hearing upon the writ there was a motion upon the part of the respondents to quash the same and also a motion to dismiss the writ because of the failure of the appellants to file its Articles of Incorporation (Record, pp. 5-6).

A demurrer and exception to the return to the writ was also interposed by the respondents (Record, p. 17). Each of these motions and the demurrer were overruled.

The assignments of error are to be found at page 55 of the record, and are as follows:

I.

The Supreme Court erred in overruling the demurrer of the petitioner to the return, for the reason that it appeared upon the face of the said return that the petitioner had duly perfected its appeal from the order of the Judge of the Probate Court issuing letters of guardianship to the respondent, and that the said order thereupon by virtue of paragraph 1952 of the Revised Statutes of Arizona became *ipso facto* null and void.

II.

The Supreme Court erred in denying the motion of the petitioner to strike out all that portion of the said return which set forth the issuing of let-

ters of guardianship to the respondent, for the reason stated in assignment No. 1.

III.

The Supreme Court erred in ordering that the writ be dismissed for the reason that it appears by the statement of facts found by the Supreme Court that the respondent obtained the custody of the said child unlawfully and by force, and had no right whatever to the custody of the said child.

IV.

The Supreme Court erred in ordering that the writ be dismissed, for the reason that it appears by the statement of facts found by the Supreme Court that the petitioner was entitled to the custody of the said child.

V.

The Supreme Court erred in ordering that the writ be dismissed, for the reason that under the facts and the law, petitioner was entitled to the custody of the said child.

POINTS.

I.

The order of the Court below is appealable to this Court. By Section 1909, U. S. Revised Statutes, writs of error and appeal are allowed to the Supreme Court of the United States, "upon writs of habeas corpus involving the question of personal freedom."

Gonzales *vs.* Cunningham, 164 U. S. Rep., 612.
Cross *vs.* Burke, 146 U. S. Rep., 82.

The right of appeal under Section 1909 was not taken away by the Act creating the Circuit Court of Appeals.

(26 U. S. Stat. 830, Sec. 15.)

Section 15 provides for the right of appeal from the courts of territories to the Circuit Court of Appeals in cases where the judgments of the Circuit Court of Appeals are made final. And this Court has repeatedly held that it is only in cases where the judgments of the Circuit Court of Appeals are made final that this Court is deprived of the jurisdiction conferred upon it by Section 1909 of the revised statutes above cited.

Shute *v.* Keyser, 149 U. S., 649.
Folsom *v.* United States, 160 U. S., 121.

The cases where appeals may be taken from the Supreme Courts of territories to the Circuit Court

of Appeals, and when the judgments of such Circuit Court of Appeals are final are provided for in 20 U. S. Statutes, 828, Sec. 6, Cl. 1, decisions in the cases of writs of habeas corpus are not included in the classes of cases where the judgments or decisions of the Circuit Court of Appeals are final.

Appeals, then, will lie to the United States Supreme Court from the Supreme Court of the Territory of Arizona "upon writs of habeas corpus involving the question of personal freedom."

(Sec. 1909, U. S. R. S.)

Personal freedom is involved whenever the person is unlawfully detained.

It makes no difference whether the question arises between a person imprisoned upon a charge of crime, where the case is between the person so detained and the State, or whether it arises in the case of parent and child, where the custody of the child is alleged to be unlawfully withheld from the parent. If the child is not in lawful custody, and is unlawfully detained, then its personal freedom is involved.

II.

The State of New York, in its capacity of parens patriae, has an absolute right to the custody of the child.

(A) Examination of the historical development of the law relating to the status of parent and child and guardian and ward shows that the State of New York, in the case at bar, is the source

from which all right to the custody of this child proceeds, and that the State of New York has not only all the rights of a parent, which are described as the natural rights, but, in addition, has the ultimate and absolute right to the custody and control of the infant.

The doctrines which have ripened into the present law relating to this subject originated as a part of the feudal system in England. That system was founded upon the proposition that the king was the *parens patriae*, and that from him proceed all right and authority of a subject to the ownership and control of property and person. Incident to this principle of the feudal system, the first kind of guardianship established by the common law was the guardianship of the feudal lord in chivalry. The theory of this right of guardianship was that to the feudal lord there had been delegated a part of the sovereign right of knight service and that, therefore, if a tenant by knight service died, leaving an heir male under the age of twenty-one years or female under the age of fourteen years, the lord had the custody of the estate in order that he might take the income of the estate as a substitute for the knight service by which the lands under the authority of the sovereign were held. (See Co. Litt., 74 B., Section 103.)

As an incident of this kind of guardianship, there was established the right of the feudal lord to the custody of an infant child, and that right was based upon the principle that he had been delegated by his sovereign a part of the right of control of the subject by the sovereign, which was the fundamental principle upon which the feudal system was based. The relation of guardian and ward being a substitute for the relation of parent and child, it is apparent that both of those relations, and the right of both the parent and the guardian, proceed precisely from the same source;

and it follows that the right of a parent to the custody of a child is in no sense absolute, but is a trust delegated by the sovereign to the parent, and, as such, subject to be regulated by the sovereign or to be determined by the will of the king or the State. In Dwight on the Law of Persons and Personal Property (p. 242), it is said:

> "It was the theory of the English law that the king, as *parens patriae*, had the care of those who are not able to take care of themselves, particularly in cases where it is clear that some protection should be thrown around them. The right of the father, viewed from this standpoint, is not personal, but derived from the State. It is not so much a power as a *trust*. In that aspect, it is expected that he will properly take care of and rear the child with due regard to his education and training in letters, morals and religion."
>
> Cary *v.* Bertie, 2 Vernon, 333 at 342;
> Ryre *v.* Shaftsbury, 2 P. Williams, 103 at 119;
> Butler *v.* Freeman, Ambler's R., 301.

It must be conceded that the right of a parent to the custody of a child is superior to the right which is exercised by a guardian. The parent has what is known as the natural right of guardianship, which means that the law of the sovereign State has recognized the propriety of permitting a parent to control his child to the extent of establishing, as a uniform doctrine governing the exercise of the sovereign right, that, in the absence of a controlling reason for depriving the parent of his so-called natural right, he shall take precedence over others in the matter of guardianship. But consideration of the historical development of the law of this subject demonstrates that the king, as the source of power and authority over all his subjects, or the State standing in the

place of the king, over its citizens, has a power to re-take unto itself the delegated right of custody of an infant, and this power is superior, not only to that of a guardian, but to the power of a parent. In other words, the State being the source of all power and right to the custody of its citizens and, in the case at bar, the State of New York having exercised its power and re-taken to itself the custody of the child, the right of the State becomes of a character which includes all of the rights which a natural parent would have to the control of his child, and, in addition, all of the rights which a sovereign power has to the custody of its subject.

(B) The doctrine of comity between States prevented the Supreme Court of Arizona from depriving the State of New York of the custody of the infant child to which, by the laws of New York, it was entitled.

As it appears as a fact in this record that the State of New York was exercising, and attempting to continue, the custody of the person of this infant under its authority as sovereign, and by means of the direct action of its legally constituted agent, it follows that, if the question of the custody of this child were presented in the courts of the State of New York, those courts would have no right, upon any legal theory, to deprive the sovereign State of its control of the child, nor to exercise, as against the State, any discretion whatever in the matter of selecting the guardian of the infant. The situation would be precisely the same as if, at the time when the feudal system was in force in England, a chancellor, acting under, and as the personal representative of, the sovereign, had attempted to exercise his power directly against the will of the sovereign.

It is true that the Supreme Court of Arizona

was possessed of the general jurisdiction to regulate the custody of an infant merely because the infant was within the territory, just as the courts of that territory had the general jurisdiction to exercise, as against any person within its boundaries, the police power for the protection of its citizens and their property. And if the child in question had been brought into the State under the control of a natural parent or in the custody of a guardian, the courts of Arizona, having jurisdiction of the persons by reason of their situation, would have the power and the right to take any action compatible with the laws of the territory for the purpose of regulating the *status* of parent and child or guardian and ward, as justice might require.

Such a situation would be distinguishable from the case at bar in the essential respect that the courts of Arizona would then be dealing with and regulating a particular *status* which had been originated by the laws of another State. If the State of New York, in the exercise of its sovereignty, had merely created a *status* such as would have resulted from the appointment of a parent, or other designated person, to be the guardian of a child, the exercise of sovereignty would have ceased with the establishment of that *status*, leaving it to be regulated and determined by the laws of any State or country where the courts secured jurisdiction of the persons affected. But in the case at bar, the State of New York, in the exercise of its sovereignty, has done more than create the relation of guardian and ward as between its subjects, and has taken back unto itself its sovereign right to control the child. It has then come into the territory of Arizona and attempted there to continue its control of the child. An illustration of this distinction is shown clearly by considering the right of a State when exercised over property rather than

over persons. If the State of New York, by its laws, decrees that personal property shall belong to one of its citizens, the sovereignty of the State is then exercised in creating the *status* and condition of ownership. If the citizen of New York then proceeds into another State and becomes subject to another jurisdiction, that jurisdiction may, by its courts and its laws, regulate and control the ownership of that property. But, if the State of New York secures the ownership of personal property, taking it back to itself from its citizens, and that property should be brought within the jurisdiction of another State or territory, the doctrine of comity between nations would prevent the territory from so exercising its jurisdiction as to deprive the State of New York of the property which belonged to it.

This Court has held in the Bank of Augusta *vs.* Earle, 13 Peters U. S. 519 at 590, that "the intimate union of these states as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as, without doubt, must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent."

If this is the rule laid down as between the states, how much stronger should it be between the United

States and one of the sovereign states, which compose it. Full faith and credit should be given by the United States to the acts of the several states, unless they are in conflict with the policy of the Federal Government.

The exercise of comity is an exercise of sovereign power, a determination of sovereign policy.

There is no sovereignty in a territory; its authorities can exercise no sovereign power, can determine upon no sovereign policy.

This Court has repeatedly held that the Government of the United States is the sovereign of the territories, and it is for that Government to determine the policy of those territories. And in the absence of any legislation in that behalf, it is for this Court, in proper cases, to determine what that policy shall be, and it is respectfully submitted that this case calls for a determination which will recognize and give full force and effect to the Act of the State of New York in intrusting its wards to the care and custody of this appellant; and permit them to remain where their parent, the State of New York, placed them, and not in the care of those beyond its control, and upon whom it can enforce no responsibility.

(C) *The State of New York, having all of the rights of a natural parent to the control of this child, was entitled to its custody by reason of the finding of the Supreme Court of Arizona that the State of New York was a fit guardian for the child.*

By the findings of fact of the Court below, upon which this Court must make its determination, it appears as a fact that the State of New York, by its agent, the Foundling Asylum, was a fit and proper guardian of the child. It is true it also appears that the persons having the present custody of the child were fit and proper persons. The de-

cision of the Court below awarding the custody of this child to persons other than the appellant, was made upon a record wherein it was determined that, as between two persons, one of whom had all the rights of a parent to the child's custody, and the other being a stranger, both persons being fit, the custody of the child was awarded to the stranger. In Dwight on the Law of Persons and Personal Property, 243, it is said:

> "Still, the court has no power to deprive the father of the custody of the child merely because it for the latter's benefit, nor merely on the ground of his peculiar religious opinions, nor on account of poverty, passionate temper, or harshness in conduct. It is not enough that removal from the father would be better for the children, but it must appear to be essential to their safety and welfare. The jurisdiction is not confined to residents, but extends to citizen parents, though the children may be born and reside abroad."

In Richards *v.* Collins (45 N. J. Eq. 283, at 286), it is said:

> "Doubtless it is the strict legal right of parents and those standing *in loco parentis*, to have the custody of their infant children as against strangers. This right will control the judgment of the Court unless circumstances of weight and importance connected with the welfare of the child exist to overbear such strict legal right."

In the case of *In re* Finn (2 De Gex & S. 457), it is held that, before the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court must be satisfied that the father has so conducted himself, or placed himself in such a position, as to render it not merely better for the children, but essential

to their safety or welfare, that the father's rights should be interfered with.

Again, in Curtis *v.* Curtis (5 Jurist, U. S.), the doctrine of *In re* Finn is approved, and it is held that the Court of Chancery has no jurisdiction to remove a child from the custody of its natural parents merely because it would be for the benefit of the child. Such a removal can be decreed only when "in some very material and important respect it is *essential* to the welfare and well-being of the children, either physically, intellectually or morally, that it should be so."

(See page 1148.)

III.

The facts found by the Court below entitled appellant as a matter of right to the custody of the child.

(A) These facts are briefly as follows: That a child, William Norton, born out of wedlock and abandoned, was, in October, 1902, received and taken under its care, charge, custody and management by The Foundling Hospital, under its charter. The child, having been abandoned, became a ward of the State, which under such circumstances acts as *parens patriae*.

Fondham *vs.* Pierce, 141 Mass., 203.
Ex parte Krauss, 4 Wharton (Pa.), 9.
In re Barry, 42 Fed. Rep., 113, at p. 118.

In re Barry, the Court, at page 118, says:

> "The cases before cited show that the English and American Courts act in this

> behalf solely upon the assertion of the right of the sovereign whose power they administer to continue or change the custody of the child at his discretion as *parens patriae*, allowing the infant, if of competent age, to elect for himself; if not, making the election for him."

The Foundling Hospital, therefore, in all that it did with reference to this child, under its charter, acted as the agent of the State of New York, and as its representative, in carrying out and fulfilling the duties imposed upon the State itself. Whatever interference was had by any one with the Hospital, while carrying out such duties, was an interference with the agents of the State of New York. Without reference to the question as to the legal rights of such agents in another State, it is perfectly clear that very strong reasons must exist to justify the Courts of Arizona in refusing to recognize the right of the State of New York to the possession of its wards.

In Woodworth *vs.* Spring (4 Allen, 321), cited by the Court of Arizona with approval, the Court, speaking of the rights of a guardian of a child, say:

> "But in such cases the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another State as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly States having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicile. And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to

> which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the Court to award to the foreign guardian the custody of the person."

An examination of that case shows that the decision was based upon the ground that the claim to the custody of the child was made by a guardian appointed in another State. The Court says:

> "An administrator appointed under the laws of a foreign State cannot act as such in this Commonwealth, nor, for like reasons, can a guardian appointed by virtue of the Statutes of another State execute any authority here over the person or property of his ward. His rights and powers are strictly local and circumscribed by the jurisdiction of the Government which clothed him with the office."
>
> P. 324.

And it recognizes a palpable distinction between that case and that of a foreign parent.

At page 323, the Court says:

> "Even the parental relation, *which is everywhere recognized*, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. The *patria potestas* of a foreign parent over his child is not that which is vested in him by the laws of the place of his domicile, but that which exists by virtue of the parental relation in the country where the father seeks to enforce his authority."

So that, had the application in the Massachusetts case been made by the father of the child, the Court would undoubtedly have granted the application, inasmuch as the parental relation, everywhere recognized, would confer upon a foreign parent the right to the custody of his child under the laws

of Massachusetts, where the father sought to enforce his authority.

It is respectfully submitted that the relation of a State to an abandoned child within its jurisdiction gives it and its agents even a greater right to recognition in a foreign State than in the case of a parent. The power of a parent over a child exists only by virtue of the consent of the State where the child is born, and the State always retains the paramount right of disposing of the custody and care of that child in cases where it considers it for the interests of the child so to do.

The State acts upon the assumption that its authority as *parens patriae* supersedes all authority conferred by birth.

People *v.* Chegary, 18 Wend., 637-42.
People *v.* Mercein, 8 Paige, Ch. 47-69.

But the fatherhood of the State, so to speak of its relation, applies with peculiar force to the case of an abandoned child. That child, having been abandoned by the parent and become a ward of the State, such relation will be recognized wherever the child may be found. That the State in this instance had confided the custody to the Foundling Hospital is immaterial. It must perform its duty towards the child through the instrumentality of some agent, and never loses its legal relation to the child from the fact that it has confided it to any particular person or institution.

Again, the obligation of State comity in a case like this, where the public policy of the State of New York is interfered with and thwarted, is so strong that it would seem that it was the duty of the Court to recognize no reason or excuse for refusing to the State its ward except the consent of the State itself.

It is well settled by the Courts of New York that the managers of the institution are not bound by

State limits in providing for children committed to them under the statutes.

> People vs. Governors, &c., of House of Refuge, 18 How. Prac. Rep., 409.

The Hospital, therefore, when it sent the child to Arizona, was carrying out its duty in a manner recognized by the laws of the State.

IV.

The State of New York having rightfully confided these children to the appellant, the appellant has, irrespective of its agency for the State of New York, a legal right to the custody and control of the children, even when such children are without the State of New York and within a Territory, because of the powers lawfully vested in it as a corporation.

(A) Treated simply as a corporation, and not as an agent, representing and acting for the State of New York, the Courts of Arizona should have recognized the appellant's right to the custody of these children.

In the absence of any law to the contrary, the appellant had a right to exercise its right of custody and control over the children confided to it, in any part of the United States.

While a corporation "Must dwell in the place of its creation and cannot migrate to another sover-

eignty" (Bank of Augusta *v.* Earle, 13 Peters, 588), still its existence may be recognized in other States, and its residence presents no objection, *per se*, to its transacting its business in other States.

And in pursuance of the general law of comity among States composing the Union, the presumption is that a corporation, if not forbidden by its charter, may exercise the powers thereby granted, within other States, unless prohibited therefrom, either by direct enactment of their statutes or by the settled adjudications of their highest Courts.

Am. & For., Christian Union *v.* Yount, 101 U. S., 352.

There has been no direct enactment by statute that prevents the appellant exercising its corporate powers in the territory of Arizona, so far as they relate merely to the custody, control and care of children intrusted to it.

The certificate and conditions required of foreign corporations by Title 13, Chapter 9, of the territorial statutes of Arizona relate to business corporations, and are exacted as conditions of their doing business in the territory.

They were never intended to relate to charitable, benevolent or religious corporations, not engaged in business as such. The custody of children, and placing them in homes, temporarily, with a view to final adoption, certainly will not be construed to be the transaction of business.

Neither has there been a settled adjudication by the highest Court of the territory forbidding or prohibiting the appellant from the exercise of its corporate powers within the territory.

What is the highest court of a territory?

The highest court of a State is vastly different from a territorial court.

As to one, the Court of last resort in State matters is a State court; as to the other, the court

of last resort in territorial matters is the United States Supreme Court, or United States Circuit Court of Appeals.

"The people of the United States as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms."

Murphey *v.* Ramsey, 114 U. S., 15-44.
Mormon Church *v.* United States, 136 U. S., 1-44.
Shively *v.* Bowlby, 152 U. S., 1.

The Government consists of three branches, the executive, the legislative and the judicial; and the highest judicial expression that can be applicable to a territory is that given forth by the United States Supreme Court.

When it is stated that the Government of the United States has control of the territories, it doesn't mean one branch of the Government, but the Government as a whole, consisting of the executive, the legislative and the judicial departments thereof, so that the highest judicial expression of the policy of the territory must come from the United States Supreme Court, that is, that Court is as to territories their highest Court. And from that court has proceeded no adjudication that a corporation, such as the appellant, should not be permitted to exercise its power of custody, and control of the children confided to it, in any of the territories of the United States. Surely if the principle of comity between the States is ever to be applied, if corporate powers conferred in one State are ever to be recognized in other parts of

the United States, that principle should be applied and that recognition given, to purely benevolent, charitable and religious corporations, so long as those powers do not conflict with the policy of other States and parts of the Union, as declared by their laws or the adjudications of their courts. And certainly there is nothing in the powers conferred upon this appellant that is in conflict with the policy of any Christian civilized community.

If that principle of comity is to be recognized as to the Statute which created this appellant, and recognition given to it, and to the corporation created by it, then the appellant, as a corporation purely, and not as the agent of the State of New York performing a duty incumbent upon that State, was and is legally entitled to the custody of the children confided to it.

The State of New York, where they were born and have their domicile,is their *parens patriae*, with right, as we have seen, superior even to their natural parents, has intrusted them to the appellant, and the spirit of comity requires that that act of the State of New York should be given full force and effect.

V.

As a mere matter of legal discretion, upon the facts found, the Court should have restored these children to the custody of the appellant.

The formal conclusions of fact found by the Court are rather highly colored, and they must be supplemented by the statement of facts made by the learned justice writing the opinion, and in which all the members of the Court concurred.

It is clear upon the facts that the appellant never parted with the custody and control of these children until they were taken from it by threats and violence.

It is perfectly apparent that the disposition of these children amongst the half-breed Mexican Indians was not intended to be a final disposition of them. The learned justice in his statement of facts, says that:

"Upon the arrival of the train the priest came into the car, and Sister Anna Michella then asked him what sort of people they were to whom the children were to be allotted. He thereupon said that they were all good American citizens, moral, and had no children of their own, and that the homes were all that could be wished for. Having noticed that some of the people were not as fair in color as she had hoped for and expected, the sister asked him if there would be any half-breeds among them, and he said, 'No.' She asked him how the people lived, and he replied that they lived in frame houses. She then stated to him that it was the rule of the home that the children were only placed out on trial until such time as the homes could be visited by the sisters, and that if it were found that any of the homes were not as expected the children would be removed" (folios 94-95).

She then added "The father told us 'That will be all right'; we could be fully assured we were to have perfect freedom of act in that way" (folio 133, from the evidence).

Again he says that after the distribution of the children, which caused so much indigation, citizens to the number of two or three hundred, assembled to meet the agent Swayne and the priest. "At this meeting much excitement was manifested, but no act of violence was done at that or any other time; some threats, however, of a general

character were made by certain persons against the agent Swayne. Both Swayne and the priest made a statement of their position at this meeting. Swayne at that time was apprehensive that he might receive bodily harm. In his statement at the meeting he said that the children were placed temporarily in charge of the people to whom they had been consigned, but the understanding was that sisters were to remain for a matter of two or three weeks, and if it were found by them that any of the children were placed in improper homes they would be taken from such homes and replaced." (Folios 98-99.)

It thus very clearly appears that the children were not definitely disposed of to the Mexican Indians. That had not been the original intention. Their disposition was simply tentative, until it could be ascertained that the people to whom they had been consigned were worthy to have the permanent care of them.

The case shows very clearly that the children were taken from the officers of the appellant, and withheld from them by force. It is not a case of abandonment, or surrender, where the party holding the child has rightfully, or at least without wrong or violence, become possessed of the person of a child, and refuses to surrender it to the one who was originally rightfully entitled to its custody, but who had by his acts forfeited that right.

From the eleventh finding of fact by the Court, it would appear that three of the children, including the infant Norton, were voluntarily delivered by Swayne to the Deputy Sheriff, to be distributed among the American residents in Morenci, but such was not the fact. In the statement of facts made by the justice writing the opinion, he states that Swayne "protested against the taking of the children by the American residents; and neither by his consent, nor that of the sisters, were the

children either taken from the homes in which they had been placed, or given to the respondents."

The appellant thus lost control of the children confided to its custody by the State of New York, not by the consent of its officer, but through force, provoked by the blunders of those in whom the appellant had confided. And the fact that the plaintiff in error made a mistake or was guilty of an error in judgment in committing, through its temporary agents, the custody of these children to the care, upon probation, of unfit and unworthy persons, is not sufficient to deprive it of its right to the care and custody of such children.

The learned Court below, in its opinion, states: "The petitioner has frankly conceded that a great blunder was committed in the consignment and delivery of the children to these degraded half-breed Indians. The evidence satisfies us that it was an unintentional blunder on the part of the institution, and was caused by the misleading and inaccurate report of the local priest, who was not connected with the institution, and was a foreigner and unacquainted with existing conditions; that such blunder was not remedied at the time because of the tactless stubborness of the agent, and the feeling of the sister in charge that she must bow to the authority of the priest, who insisted upon such disposition. We recognize the desire of the institution to right now, and to right itself the wrong done these children, and to secure for them now suitable homes to be chosen by it; and, with the record of its great service to humanity in the past, we have no doubt of its purpose and ability to do so." (folio 108).

Under that state of facts, it would seem that no possible doubt could exist as to the duty of the Court to restore to the Hospital the custody of the child, of which it had been illegally and forcibly deprived.

Even when the child has been taken away from its parents because of their neglect, they may regain it by showing that the cause for which their child was taken from them no longer exists.

In the case of Farnham *v.* Pierce, 141 Mass., 203, it was held that a commitment under a statute of that state of a child to the custody of the Overseer of the Poor of a City by a District Court, upon a finding that the child was, by the neglect of its parents, growing up without education and salutary control, in circumstances exposing it to lead an idle, dissolute life, is valid, and the statute constitutional; but the committment is not conclusive upon the parent as an adjudication of his right to the custody of the child; and upon a petition for a writ of habeas corpus to obtain the custody of the child, the parent may show that the cause stated for the commitment no longer exists, that he is competent and fit to have the care of the child, and that the welfare of the child will permit of its removal to its parent's custody.

Here the wrong was concededly committed by one not connected with the appellant, and when the appellant desires to rectify the wrong, by taking the children back to the east, it is prevented by force from doing so, and deprived of the legal custody of the children, and the Court gives as a reason for ratifying the force used, and upholding the wrong done, that "it appears that the mis-"take as originally made, was made by one not "connected with the petitioner, and that the ulti-"mate purpose of the institution, that of finding "suitable homes for their children, has in this in-"stance, already been accomplished, we do not be-"lieve that the best interests of the children will "be promoted by allowing the petitioner to adopt "the course it desires." (Page 51, fol. 108.)

Why the fact that the mistake that was made, was made by one not connected with the appellant,

is a reason why it should not have its children restored to it, I am unable to understand.

Conceding that the Court, may, upon habeas corpus, in its discretion, disregard the strict legal rights of parties to the custody of infants, still that discretion should not be exercised unless there has been an abandonment, or surrender, of that legal right, or the legal custodians are shown to be unfit to longer have the control of such infants.

Here there was no abandonment, or surrender, by the appellant, of its legal right to the custody of these children; it expressly reserved its control over them; it expressly reserved the right to take them from the persons to whom they had been consigned, if upon trial such persons were found to be unfit.

Conceding that a mistake was made in the selection of homes; it was made by those not connected with the appellant. And the Court below has found that the appellant has frankly acknowledged its mistake, and is anxious and willing to rectify it.

It has also found that the appellant is able, willing and fit to have the custody and control of these children.

Surely these facts do not present a case warranting the Court in disregarding the legal rights of the appellant.

Assuming that the Court may exercise its discretion as to granting the prayer of the petitioner, nevertheless such discretion must be "not arbitrary and capricious, but a sound judicial discretion. It must be regulated upon grounds that will make it judicial."

Seymour *vs.* De Lancey, 3d Cow., N. Y. Rep., 505-521.

In the case at bar it is respectfully submitted that there are no grounds upon which the Court

below has exercised its discretion that will bear the test of examination. The Court finds as a matter of fact that the institution, which has a legal title to the care and custody of the child, "desires to secure for the child a suitable home, to be chosen by it, and that, with the record of its great services to humanity in the past, the Court has no doubt of its purpose and ability to do so." This is a fact. Against this, there is nothing but the guesswork of the Court that the child will be well taken care of by its present custodian. That can be at most simple guesswork. It has no basis of fact or of experience or knowledge to sustain it. Nor is there any legal or moral obligation on the part of the present custodian to continue the support of the child. What is said by the Court as to the probability that in no other home that can be found for the child is it likely to fare so well, and that it is for its best interests that it should grow up to manhood "in the changing West, the land of opportunity and hope," cannot be said to justify any judicial decision. Certainly not a decision depriving the petitioner of its undoubted legal right, and substituting for its trained and experienced judgment the guesswork of those who have had no experience whatever in the matter.

The fact that the original mistake was made by one not connected with the petitioner would seem to be a reason for rectifying that mistake by directing a restoration of the child, rather than for denying it; and the fact that the ultimate purpose of the institution—that of finding suitable homes for their children—has in this instance already been accomplished, leaves entirely out of view the fact that such home is not one selected or approved by the institution. The State of New York devolved upon the Hospital the power and duty of selecting a home for the wards of the State; and to hold that such power has been forfeited because

by a mere accident a stranger has obtained possession of the child, without the consent or knowledge of the State of New York or its representative, is, it is respectfully submitted, a disregard of the duty of the Court of Arizona. The bringing of this proceeding by the Hospital is of itself conclusive evidence that it is not satisfied with the present home of the infant. But the Court in effect has said, "True, the respondent obtained and retained possession of the child without your knowledge or consent, but inasmuch as he has expended much money and much time in resisting your efforts to enforce your rights to the custody of the child, and has shown great affection for the child; and, inasmuch as the West is a great and prosperous country, your application is denied." There is no sound judicial discretion in such a judgment; it is simply capricious and arbitrary.

The right of the Hospital to visit the homes and retain a supervision over the child (Finding 2) is lost by the action of the Court.

This is of the greatest importance to the child and to its parent and to the State of New York.

VI.

The fact that the respondent has been appointed guardian of the infant Norton, gives him no legal right to its custody, and presents no legal obstacle to its being restored to the appellant.

Even when a guardian has been legally and properly appointed, and the appointment remains in full force, such appointment does not operate

as a bar to prevent the Court, on habeas corpus, awarding the custody of the infant to some other person.

In the case of Woodworth *v.* Spring, 4 Allen, 321, cited in the court below, a guardian had been appointed in the State of Illinois, where the child was legally domiciled. One had also been appointed in the State of Massachusetts, where the child was at the time of the controversy. And in reference to this latter appointment, the Court said: "Nor can we see that the appointment of a guardian over the minor by the Probate Court in such Commonwealth operates to bar any decree by this Court in favor of the foreign guardian, awarding to him the custody of his ward. * * * The decree of the Probate Court does not deprive this Court of the power to adjudicate and determine the question of the proper custody of the child as between the domestic guardian, and one appointed in the place of the domicile of the infant. The jurisdiction of this court to decide, on habeas corpus or other proper process, concerning the care and custody of infants, is paramount, and it cannot be taken away by any decree of an inferior tribunal."

In the case now before us, at the time of the proceedings before the territorial court, the respondent was not a legal guardian even in the territory. An appeal had been taken from the order appointing him guardian (page 29), and the statute in that territory, which provides for appeals from decisions or decrees of the Probate Court to the District Court, also provides that "all causes removed by appeal to the District Court shall be tried anew, as if originally brought in such court." (Title 17, Chap. 13, Sec. 1952, Revised Statutes of Arizona.) And the Court below has held, and I think properly held, that "such appeal vacates the order of appointment and the

letters issued thereunder." (Page 51, Fol. 107.)

The respondent, then, had not even a colorable right to the possession of the child. And we are thus presented with the spectacle of a child taken from its legal custodian and guardian, its legal parents, so to speak, who is found by the Court to be a proper guardian and custodian of the child, imbued with a proper purpose to care for it, and with perfect ability to do so, and turned over to a stranger, to one utterly without any legal right to its custody and control.

It is respectfully submitted that the order appealed from should be reversed, and an order entered awarding the custody of the infant, William Norton, to this appellant.

D. Cady Herrick,
Charles E. Miller,
William C. Trull,
Of Counsel for Appellant.

FILE COPY.

In the Supreme Court of the United States

OCTOBER TERM, 1905.

No. 258 21

NEW YORK FOUNDLING HOSPITAL,
Petitioner and Appellant,
vs.
JOHN C. GATTI,
Respondent and Appellee.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk

Appeal from the Supreme Court of the Territory of Arizona.

Brief for Appellee.

as Motion (appendix.)

A. A. HOEHLING, JR., and
WALTER BENNETT,
Attorneys for Appellee.

THE H. H. McNEIL CO., PRINTERS, PHOENIX, ARIZONA.

IN THE SUPREME COURT OF THE UNITED STATES

NEW YORK FOUNDLING HOSPITAL,
Petitioner and Appellant,
vs.
JOHN C. GATTI,
Respondent and Appellee.

STATEMENT

This is a petition for a writ of *habeas corpus*, original in the Supreme Court of Arizona. After a full hearing before the Court in bank, upon the return, the writ was dismissed. A full statement of the facts found by the Supreme Court of Arizona is contained in the transcript of the record in the case (folios 465-473) and, briefly stated, such facts are as follows, viz.:

The petitioner is an incorporated charitable institution, of New York, deriving its powers from a special act of the Legislature of New York, a copy of which act is contained in the record (folios 27-36). By this act of the

Legislature the corporation is given the following powers:

1. To take charge, custody and management of foundling and deserted children.

2. When such children arrive at proper age, to bind out, indenture or apprentice such children to some profession, trade or employment, and, in case of the death of the mother, to assume charge and management of such children.

3. By the act referred to the corporation is constituted the guardian of the children so "bound out or held for service under the provisions of this act."

The above we believe to be all the powers of the petitioner corporation under the act creating it, so far as affects the case at bar.

On October 4, 1902, the child William Norton was born in the New York Foundling Hospital and was, with its mother's consent, taken in charge, custody and management by the hospital.

In September, 1904, the petitioner shipped a carload of the hospital children to Arizona, tagged and consigned to Mexican-Indians in and around the towns of Clifton and Morenci, in Graham county, Arizona, and on their arrival they were delivered to the several consignees by the agents of the hospital in charge

of the band of children without any examination of the character of the consignees or their homes.

The children were about equally divided as to sex; were all of the white, Caucasian race; of fair complexion; were clean and neatly clad and of unusual intelligence and beauty, and from one and one-half to three years of age.

The consignees to whom the children were delivered were found by the Supreme Court of Arizona, after a full hearing upon the merits, to be "the lowest class of halfbreed Mexican-Indians, dark skinned, of low and filthy habits of life, vicious, unacquainted with the English language, and, in several cases, prostitutes and persons of notoriously bad character. Their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs, and many of them had children of their own whom they were unable to support, and were entirely unfit to have the care, custody, control and education of white, Caucasian children." (Folio 469 Tr. of Record.) The child William Norton was consigned and delivered to Santos Gonzales, and is now in the possession and control of the respondent, John C. Gatti.

After the distribution of the children at Clifton, the leading white citizens, including

the law officers of the county, protested to the agent in charge of the band of children against the delivery of the children to the consignees on account of their race, personal character and general unfitness. This protest was without avail. The people were told, in effect, that it was none of their business. The agent in charge of the children declaring that the children had been "placed and would stay placed." (Folio 470 Tr. of Record.) There upon the assembled people of Clifton appointed a committee of reputable white citizens to take the children from the halfbreed Mexican-Indians with whom they had been placed and bring them to the hotel in Clifton. The children were all thereupon surrendered to the committee without protest and by them taken to the hotel.

The condition of the children, when returned to the hotel, is found by the Court in the following language:

"Upon the arrival of the train in Clifton, all the children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from the Mexican-Indians, they were in a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects

of coarse Mexican beans, chilis, watermelons, and other improper food which had been fed them, and in some instances from the effects of beer and whisky that had been given them to drink. Upon the arrival of the children at the hotel, certain good women of the place took charge of them, nursed them and secured medical care and attention for them. On the next day the children were distributed among the several respondents in these cases, who have since had them in their care, custody and control." (Folio 471 Tr. of Record.)

After this action by the Clifton people, and when it became apparent that the people of Morenci would not permit the children distributed there to remain with the Mexican-Indians, to whom they had been delivered, the agents in charge of the band took those children themselves and returned with them in the car in which they had been brought out.

In regard to the fitness of the present custodians of the children and what the best interests of the children demand, the Court makes the following finding:

"Each of the respondents is a fit and proper person to have the care, custody, control and education of the children. They are in every case people of sufficient means properly to care for and educate the children, and in every case they are fit persons by reason of

their character, standing and age to have and maintain such care, custody and control. Without exception, they have become greatly attached to the children and the children to them; and each respondent desires to retain the possession of the child which he has, in order that he may rear it as one of his own family. We further find that it would be detrimental to each of said children to take it from the custody of the respondent who now has it in his care, and that the best interests of each of said children will be subserved by permitting it to remain in the custody and control of the respondent who now has it in his care." (Folios 472-473, Tr. of Record.)

On October 16, 1904, applications were made by each of the respondents to the Probate Court of Graham county for letters of guardianship of the person of the child which each possessed. Petitioner had notice of such application, appeared by counsel and resisted the same, and in each case letters of guardianship were granted to the respondent and each respondent duly qualified as such guardian, including the respondent John C. Gatti, as guardian of the child William Norton. Thereupon the petitioner appealed from the order granting said letters in each case, to the District Court of Graham County, Arizona, and pending said appeal these petitions were

filed, and, in response to the writ, the children were brought before the Supreme Court of Arizona.

It is stipulated in this case that all the writs shall abide the result of this case.

BRIEF

I.

This being a proceeding by *habeas corpus* to invoke the powers of this Court, as *parens patriae* to award the care, custody and control of a minor child, it is not a case of *habeas corpus* "involving the question of personal freedom" within the meaning of Sec. 1909 of the Revised Statutes of the United States, and this Court has no jurisdiction to review the judgment of the Supreme Court of the Territory of Arizona on this appeal.

Sec. 1909, Rev. Stat. U. S.
Gonzales vs. Cunningham, 164 U. S. 612.
In re Burrus, 136 U. S. 586.
In re Barry, 42 Fed. 113.
King vs. McLean Asylum, 64 Fed. 331.
Clifford vs. Williams, 131 Fed. 100.

II.

The charter of the New York Foundling Hospital gives it no power to place children

confided to its care in other homes or institutions, either within or without the State of New York, or to retain any control over them when so placed, except in case of children of suitable age, bound out or apprenticed to some trade, profession or employment. (See charter of petitioner, folios 27-36, Tr. of Record).

III.

The New York Foundling Hospital is a foreign corporation in relation to the Territory of Arizona; as such foreign corporation, or as *de facto* foreign guardian, it could exercise no power or authority over the minor child as a matter of right in the Territory of Arizona. It has not complied with the laws of Arizona, so as to give it any standing as a corporation, in that it has not filed in the office of the Territorial Auditor a copy of its charter or appointment of an agent upon whom process can be served. (See statement of fact, folio 466 of transcript.) Therefore all its acts in said Territory are void and it can maintain no action in the courts of that Territory.

Chapter IX Rev. Stat. Ariz. 1901.
Morgan vs. Potter, 157 U. S. 195.
Hoyt vs. Sprague, 103 U. S. 613, 631.
Jones vs Bowman, 67 L. R. A. 860.
In re Nichols Estate, 34 Pac. 250.

IV.

At the time of the issuance of the writ of *habeas corpus* the respondent was the guardian of the minor child William Norton, by appointment of the Probate Court of Graham county, Arizona, and had qualified and was acting as such guardian. The respondent could, not as a matter of law, be guilty of restraining or depriving his ward of his liberty.

Fitts vs. Fitts, 21 Tex. 511.
Ferguson vs. Ferguson, 36 Mo. 197.
Mathews vs. Wade, 2 West Va. 464.
Ex parte Miller, 109 Cal. 643.
In re Chin Mee Ho, 73 Pac. 1002.
In re Lundberg, 77 Pac. 156.
Church on ***Habeas Corpus***, Sec. 457.

V.

On appeal from the Supreme Courts of the Territories, the Supreme Court of the United States is by statute restricted to an inquiry whether the findings of fact made by the Court below support its judgment, and to a review of exceptions duly taken to rulings on admission or rejection of evidence.

Grayson vs. Lynch, 163 U. S. 468.
Bear Lake vs. Garland, 164 U. S. 1-18.
Harrison vs. Pearce, 168 U. S. 311-323.
Young vs. Army, 171 U. S. 171-183.

Apache County vs. Barth, 177 U. S. 538-542.

VI.

In all cases in which the Court has jurisdiction to award the custody of a minor child, the best interests of the child is the controlling consideration.

In re Barry, 42 Fed. 113-121.
Woodworth vs. Spring, 4 Allen 321.
Kelsey vs. Gollee, 69 Conn. 291.
Lamar vs. Harris, 44 S. E. 867.
Church on *Habeas Corpus*, Sec. 446.

ARGUMENT

I.

We believe this Court is without jurisdiction in this appeal.

In the case of Gonzales vs. Cunningham, 164 U. S. 612, this Court has clearly pointed out that all its jurisdiction to review the judgments and orders of the Supreme Courts of the Territories is derived from sections 702 and 1909 of the U. S. Revised Statutes, the latter of which, after enumerating other cases in which the right of review of such orders and judgments is given to this Court, adds; "upon

writs of *habeas corpus* involving the question of personal freedom."

It seems clear that the words "involving the question of personal freedom" are words of limitation and are intended to give this Court jurisdiction to review on appeal only those cases of *habeas corpus* which are sued out by the person who is himself actually deprived of his liberty, and not that class of cases where the writ is employed in civil litigation by parties each claiming posession of an infant, and in which the powers of the Court or chancellor as *parens patriae* are invoked. in the case of a contest for the care, custody and control of a child of tender years, the "question of personal freedom" cannot be involved. It is only the place and character of confinement, and not the legality of any restraint whatever, that is involved. Whichever party to such litigation is successful, the restraint must be the same, and the contest is only as to place and character of that restraint. The distinction between those cases which truly involve personal freedom and those cases in which the alleged unlawful detention is a mere fiction of the law to enable the chancellor to exercise his prerogative as *parens patriae* are clearly pointed out by the Circuit Court of

Appeals, First District, in the case of King vs. McLean, 64 Fed. 331-335.

The provisions of the U. S. Revised Statutes (Sec. 1909) regarding the review by this Court of orders and judgments of the Supreme Courts of the Territories in *habeas corpus* are certainly more restricted than the powers granted by Sec. 752 to the Judges of the United States Courts to grant the writ. The former limit the power of review to those cases of *habeas corpus* "involving the question of personal freedom." The latter confer power to grant the writ "for the purpose of an inquiry into the cause of restraint of liberty." Yet this Court has held that a District Court of the United States has no jurisdiction to issue a writ of *habeas corpus* to restore an infant to the custody of its father.

In re Burrus, 136 U. S. 586.

The same question was before the Circuit Court of Appeals, First District, in the case of King vs. McLean Asylum, etc., in which the the Court says:

"On the whole, in view of the considerations which we have stated in an earlier portion of this opinion, we feel ourselves unauthorized to accept *In re* Burrus beyond the issue solemnly determined in the case, w[illegible]

was, that the District Courts of the United States have not jurisdiction *parens patriae* to issue the writ of *habeas corpus*."

King vs. McLean Asylum, 64 Fed. 331-350.

We think the limitation of the jurisdiction of this Court to review orders and decrees of the Supreme Courts of the Territories, imposed by section 1909, Revised Statutes United States, to cases "involving the question of personal freedom" was placed there for the very purpose of excluding from the consideration of this Court all *habeas corpus* cases involving the domestic relations, or wherein the prerogative of the trial court as *parens patriae* is invoked, for the reason that in such cases there is usually involved matters of discretion rather than right. As said by the Circuit Court of Appeals, First District, in the case before referred to:

"We may as well emphasize at this point the distinction between proceedings under the writ, when they *truly involve personal liberty*, and proceedings like those before Judge Betts and Judge Shaw, touching the custody of a child. * * * * The former involve matters of right, but the latter only the exercise of a wise discretion as to care, maintenance or ed-

ucation, and the writ is merely a convenient incident of the litigation."

King vs. McLean Asylum, 64 Fed. 331, 335.

II.

By the statement of facts found by the Supreme Court of Arizona it appears that the child William Norton was voluntarily brought by the petitioner into the Territory of Arizona and placed in the care, custody and control of a resident of that Territory, with the purpose and intention of making that Territory the place of domicile and permanent residence of the child. (Folio 467 Tr. of Record).

The act of the Legislature of New York, passed May 11, 1872, purporting to be an amendment to the charter of the New York Foundling Hospital, a copy of which is attached to the petition for the writ (folios 27-36, Tr. of Record), is the only source of power or authority relied on by the petitioner to maintain this preceding. Being a corporation, it can have no powers except those expressly conferred by its charter or necessarily implied from the powers so conferred. We do not find expressed in said charter any power or authority in the hospital to place the children in its charge in other homes, either within or without the State of New York, or

to retain any authority or control over them after they are so placed. Nor do we believe any such thing is contemplated by the act referred to.

It is true that by section 2 of the act referred to, the hospital is given power "when the children in their care shall respectively attain a proper age, to place them at suitable employments, and cause them to be instructed in suitable branches of knowledge, and, at discretion, to bind out or indenture such children, etc. * * *;" and by section 8 the managers of the hospital are constituted the guardian of children so "bound out or held for service under the provisions of this act * * *." But it will hardly be contended that these provisions can be made to embrace the case of a child barely two years of age, placed for adoption without the State of New York.

There being, therefore, nothing in the charter of the hospital giving its managers any authority to place out children of tender years for adoption, or any dominion over such children, if they are so placed without such authority, it seems clear that by the act of so placing them the hospital managers surrender all power, dominion and authority over them. We do not dispute that the powers of a court of chancery may always be invoked in

a proper proceeding to take a child of tender years from an improper or unfit custodian and make such disposition of it as its best interests demand, but no such unfitness in the respondent has been shown or alleged, and the right of control which the hospital once had has been voluntarily abandoned.

III.

Whatever may have been the status of the petitioner regarding the child William Norton in the State of New York, it could not have any power or authority over the child in the Territory of Arizona. The findings show that the child was voluntarily brought into Arizona by the petitioner and placed in the hands of a resident of Arizona, with the purpose and intention that the child should be adopted by such resident (folio 467 Tr. of Record), and should itself be and remain a permanent resident of Arizona. The petitioner thereby surrendered every vestige of authority or control over the child, either to reclaim it or to change its foster parentage. It is not questioned that the courts of that Territory, when properly invoked, can and will exercise the prerogative of the Territory as *parens patriae*, and deal with the child as with any other minor domiciled in the Territory, as its best interests de-

mand. But we deny any right in the petitioner —the New York corporation—to assert a claim, in itself, to its care, custody or control. We think all such right was surrendered by the placing of such child in the hands of a resident of Arizona for adoption.

Furthermore the statutes of Arizona provide, in effect, that every foreign corporation, before transacting any business in that Territory, shall file in the office of the Territorial Auditor a copy of its charter and the appointment of a resident of the Territory as its agent, upon whom process may be served, which shall be taken as personal service on the corporation. The statute further provides that no such corporation shall transact any business whatever in the Territory until these provisions are complied with, and, when complied with, the corporation may appear and prosecute or defend actions in the courts of the Territory. We take it that the statute means that until the provisions above mentioned are complied with the corporation shall not be permitted to appear, or prosecute, or defend any action in the courts of the Territory.

The sections of the statutes of Arizona upon the subject above referred to are as follows:

"909. (Sec. 149) Any company incorporated under the laws of any other State, Ter-

ritory, or foreign country, which shall carry on any business, enterprise or occupation in this Territory shall, before entering upon, doing or transacting such business, enterprise or occupation in this Territory, file a certified and duly authenticated copy of its articles of incorporation or charter and the appointment of an agent, as herein after specified, with the Secretary of the Territory and the County Recorder in each county in this Territory, in which such business, enterprise or occupation is carried on, and shall publish, at least six times, in some newspaper published in each of the counties in this Territory in which such business, enterprise or occupation is to be carried on, a copy of its articles of incorporation, and, upon the expiration thereof, file an affidavit in the office of the Secretary of the Territory, stating that such publication has been made according to law. This section, however, shall not apply to insurance corporations.

"911. (Sec. 150.) Any such foreign corporation shall, in writing, over the hand of its president or other chief officer, attested by its secretary or by a resolution of its board of directors, appoint a resident agent in each county in this Territory in which it proposes to carry on any business, enterprise or occupation. All such agents shall be actual and *bona fide* residents of the county for which they are appointed, and of the Territory for at least three years, and the full name and residence of

each shall be stated in the writing appointing them.

"911. (Sec. 151.) No corporation such as is mentioned in section 149 of this title shall transact any business whatsoever in this Territory until and unless it shall have first filed its articles of incorporation and appointment of an agent, as required in the two preceding sections, and every act done by it prior to the filing thereof shall be utterly void." (Chapter IX, Title 13, pp. 349-350, Revised Statutes of Arizona, 1901.)

The findings show that the petitioner has never complied with these provisions of the statute (folio 466 Tr. of Record) and we therefore insist that it has no power to maintain this petition.

The evident purpose of the statute is to require all foreign corporations dealing with residents of the Territory to submit themselves to the orders and decrees of the courts of that Territory, before they are permitted to invoke the aid of those courts.

This provision is a most salutory one, and we think the petitioner in this case should be denied a hearing, for the reason that it has not conformed to the requirements of this statute.

IV.

At the time of the suing out of the writ of *habeas corpus* in this case the respondent,

John C. Gatti, was the duly appointed, qualified and acting guardian of the child, William Norton, by appointment of the Probate Court of Graham county, Arizona, which Court is, by statute, given exclusive jurisdiction of the appointment of guardians of minors. The Arizona statutes pertaining to the appointment of guardians and their right and duties, are as follows:

Paragraph 1954:

"The Probate Judge of each county, when it appears necessary or convenient, may appoint guardians for the persons or estates, or either, or both of them, of minors, who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of the county or who reside without the Territory, and have estate within the county. * * ."

Paragraph 1959.

"If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same."

Paragraph 1960.

"Every guardian appointed shall have the custody and care of the minor, and the care and management of his estate, until such minor arrives at the age of majority or

marries, or until the guardian is legally discharged.

Paragraph 1973:

"A guardian, appointed by a Court, has power over the person and property of the ward, unless otherwise ordered."

Paragraph 1974:

"A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the ward at any place within the Territory, but not elsewhere, without permission of the Court." (Title 17, Chapter XIV, Guardian and Ward; Article 1, Guardian of Minors, Revised Statutes of Arizona, 1901.)

The Supreme Court of Arizona incorporated the fact of this guardianship in its findings. (Folio 473 Tr. of Record.) Upon this finding we think it became at once the duty of the Court to dismiss the writ. Although there are some authorities to the contrary, the weight of authority, we think, is to the effect that in *habeas corpus* for the possession of a minor child, the plea of guardianship by the respondent is a complete answer to the writ, and that upon a trial of such plea the Court will not inquire into the right of guardianship,

except so far as to ascertain that the Court appointing the guardian had jurisdiction to make the appointment.

Church on *Habeas Corpus*, Secs. 170 and 457.
Ex parte Miller, 109 Cal. 43.
In re Lundberg, 77 Pac. 156.
In re Chin Mee Ho, 73 Pac. 1002.
Fitts vs, Fitts, 21 Tex. 511.

It is true that in this case the petitioner has attempted to appeal from the order of the Probate Court appointing the respondent the guardian of the minor child, and to this end has, in form, taken all the steps necessary to perfect such appeal. But we think this will be of no avail for two reasons: First, because petitioner, being neither the parent or guardian of the minor, has no sufficient interest to give the right to appeal; and, being a foriegn corporation and not having complied with the laws of the Territory, by filing in the Secretary's office a copy of its charter and the appointment of a resident agent, it cannot rightfully do any act or appear in or prosecute or defend in any proceeding in the courts of this Territory, and, second, because, even if such appeal could be rightfully maintained by petitioner, such appeal does not vacate or suspend the oper-

ation of the judgment of the Probate Court appointing the respondent such guardian.

Estate of Moore, 86 Cal. 72.
Estate of Coogan, 65 Cal. 332
Morrell vs. Phillips, 34 Conn. 112
State vs. Probate Court, 17 La. 432.
Successors of Kennedy, 29 La. Am. 408.
State vs. McCowan, 21 Vt. 305.
Dutcher vs. Culver, 23 Minn. 415

The last case cited very clearly points out why the appeal in such cases should not vacate the order. In case of an appeal from an order appointing an administrator, the estate would be left without a legal custodian, and in case of an appeal from an order appointing a guardian, the infant would be without legal protection. We therefore confidently believe that, at the time of the suing out of this writ, the respondent was the legally constitued guardian of the child, and, under the statutes of Arizona, was entitled to its custody and control, until the order appointing him should be vacated by a direct proceeding instituted for that purpose.

V.

On appeal from the Supreme Court of the Territories, this Court is bound by the facts found by the Supreme Court, and, as the ap-

pellant has not assigned for error any ruling of the Supreme Court of Arizona upon the admission or rejection of evidence or any other ruling of that Court at the hearing (folios 117-118 Tr. of Record), the reporter's transcript of the evidence (being folios 129 457 of the printed Tr. of Record) has no place in the record in this court and must be disregarded.

VI.

On appeals from the Supreme Courts of the Territories this Court will not look beyond the findings of such Courts for the facts in the case. In this case the Supreme Court of Arizona finds these facts:

"Each of the respondents is a fit and proper person to have the care, custody and education of the children. They are in each case people of sufficient means properly to care for and educate the children, and in every case they are fit persons, by reason of their character, standing and age to have and maintain such care, custody and control; without exception, they have become greatly attached to the children and the children to them, and each respondent desires to retain the possession of the child which he has, in order that he may rear it as one of his own family. We further find that it would be detrimental to each of said children to take it from the custody of the respondent who now has it in his care and

that the interests of each of such children will be subserved by permitting it to remain in the custody and control of the respondent who now has it in his care." (Folio 472 Tr. of Record.)

It should be borne in mind that the writ of *habeas corpus* in this case was issued by, and returnable to, the Supreme Court of Arizona; and that upon the return, with the respondents and the children present in court, the full bench heard the testimony orally and had full opportunity to personally observe the respondents and the children. (See statement and opinion in the case, pp. 40-52, Tr. of Record.)

The finding of fact above quoted would seem to be determinative of this appeal, aside from all other facts and considerations. In all cases involving the matter of the custody of a minor child the best interests of the child is "the pole star by which the Court is guided."

Church on *Habeas Corpus*, Sec. 446.

What is for the best interests of the child is a matter of judicial discretion. The exercise of such discretion will never be reviewed or the judgment based thereon reversed, except where such discretion has been grossly abused.

The fact that it will be detrimental to the child to take it from the respondent and that

its best interests require that the respondent be allowed to keep it being admitted, or rather established, by this appeal, this Court is asked to do that which is detrimental to the welfare of the children and against their best interests. We cannot conceive of any mere legal right in the New York corporation (even if it had such legal right) which could justify such action of the court. And what is the basis of the legal right claimed by the corporation? It cannot rely on the right of natural or foster-parentage, or legislative or judicial guardianship, for it is invested with neither. Confessedly these children were voluntarily brought by the petitioner from the State of New York into the jurisdiction of the Territory of Arizona for the purpose of finding permanent homes therein, and of being adopted by residents of Arizona. This result, whether mediately or immediately, has been accomplished, and the homes secured for them are far better than the petioner under the most favorable circumstances could have secured.

The object for which the children were taken to Arizona having been accomplished, what possible ground of complaint can the petitioner have? That those homes are not of its own selection cannot be sufficient, especially when the character of the homes it

did select for the children is considered. It is unnecessary to characterize those homes beyond the description of them by the Supreme Court of Arizona in its findings, but the contemplation of the condition of these children in those homes, leaves the mind aghast with horror. White, Caucasian children of both sexes, of fair complexions—the latter qualification by request of the consignees—of unusual beauty and attractiveness (Finding V, folio 467 Tr. of Record) to be condemned to the life of "the lowest class of half breed Mexican-Indians, dark skinned, of low and filthy habits of life, vicious, unacquainted with the English language, prostitutes and persons of notoriously bad character"! (finding VII, folio 469, Tr. of Record.) The inference is obvious. The mind recoils in horror and the moral sense revolts at the spectacle. Would it not have been a blot on our civilization if the white people of Clifton and Morenci had permitted this crime to be consummated in their midst? Were not the influential white citizens accompanied by the peace officers of the precinct (finding VIII, folio 470, Tr. of Record) justified in acting promptly and effectively to right this wrong? True, our courts are open and our judges able and just, but distances are great, communications slow, uncertain and roundabout, and cases of this

character will not admit of delay. Promptly as the American citizens of Clifton acted, the process of degredation had begun.

"Upon the arrival of the train in Clifton all the children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from the Mexican-Indians they were in a filthy condition, covered with vermin, and with two or three excepions, ill and nauseated from the effects of coarse Mexican beans, chili, watermelons, and other improper food which had been fed them, and in some instances, from the effects of beer and whisky that had been given them to drink." (Finding IX, folio 471, Tr. of Record.)

There can be no question that but for the interference of the white citizens of Clifton and Morenci this process of degradation would have proceeded until it had reached its legitimate and contemplated infamy, from which death in any form would have been a merciful release.

We do not wish to be understood as imputing to the New York Foundling Hospital any of the improper motives above suggested. We are well aware of the extent of the noble rescue work it has accomplished, and is accomplishing, and that its managers know-

ingly and intentionally consigned these little ones to the fate upon which they fell is unthinkable. We ascribe these motives and designs to the consignees of the children and the local priest who solicited the consignment. The accomplishment of these designs is chargeable to the apathy and indifference born of long usage in the distribution of foundling children and the "tactless stubborness" (opinion, folio 108, Tr. of Rec.) of the Agent Swayne, entrusted with the distribution of the children. Be this as it may, the delivery of these children to the moral outcasts to whom they were consigned, was a colossal blunder, fraught with the most appalling consequences to the innocent little ones, the rescue from which cannot be charged to the respondents as a fault. Counsel for the petitioner, who, at the beginning of the hearing, characterized the rescue as an act of lawlessness, ended by retracting such characterization and justifying and applauding the act.

The Court finds that each of the respondents is a fit and proper person to have the care, custody, control and education of the children; that, without exception, they have become greatly attached to the children and the children to them, and that it would be detrimental to each of said children to take

it from the custody of the respondent who now has it, and that the best interests of each of said children will be subserved by permitting it to remain in the custody and control of the respondent who now has it in his care. (Finding XII, folio 472, Tr. of Record.) This is a direct and positive statement of the ultimate fact upon which the judgment of the Court is based, and is couched in as strong language as is judicially fitting. But these, or any mere words, cannot express the strength of the attachment referred to. It may be asked how it is possible for so strong an attachment to be formed between the children and their foster parents in the few months that had elapsed from the time of their first connection with the children, and the hearing. We do not have to seek far for the answer. From the time of their birth the Foundling Hospital, through the children's attendents, had, no doubt, given these children such collective care as is possible in such an institution. Their sanitary and other physical needs had no doubt been carefully investigated and supplied, but they had never received, and could not receive, in such an institution, that individual care and attention—that personal affection, that the child's nature craves. When they received this personal affection in full measure for the first time

at the hands of their foster parents, whose own affections had been stirred by the children's pitiable condition, their hearts responded withan alacrity and to a degree that the child who had never lacked that personal affection could never know. That attachment has grown during the year and one-half that has elapsed since the hearing, until the ties of affection between the children and their foster parents are as strong as if the children were the fruit of their own loins. Death may sever these ties. Such severence would be regarded as the course of nature, or the result of the primeval curse, as philosophy or religious teachings may suggest, but we do not think these ties should or will be severed by judicial decree upon the facts appearing in the record in this case.

Respectfully submitted,

WALTER BENNETT,

A. A. HOEHLING,

Attorneys for Respondent.

APPENDIX.

Supreme Court of the United States.

No. 258

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,
vs.
JOHN C. GATTI.

Appeal from the Supreme Court of the Territory of Arizona.

The appellee herein, by A. A. Hoehling, Jr., and Walter Bennett, his attorneys, moves the Court to strike from the record in this cause the reporter's transcript of the testimony in said cause, being folios 129 to 457 of the printed transcript of record.

This motion is made upon the ground that the appellant has not assigned for error any ruling of the Court upon the admission or rejection of evidence (folio 118 Tr. of Record.) This Court, apart from exceptions duly taken to rulings on the admission or rejection of evidence, being limited to determining whether the findings of fact support the judgment, the

reporter's transcript of the evidence only encumbers the record and has no proper place or purpose therein.

A. A. HOEHLING, JR.,
WALTER BENNETT,
Attorneys for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 258.

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,
vs.
JOHN C. GATTI.

MARCH 5TH, 1906.

Eugene S. Ives, Esq.,
Attorney for Appellant.

SIR:—You will please take notice that motion, of which the above and foregoing is a true copy, will be presented to the Supreme Court of the United States, for its action thereon, at the time of the oral argument of

said cause, or its submission, upon the merits.

Respectfully,

A. A. HOEHLING, JR.,
WALTER BENNETT,
Attorneys for Appellee.

Service of copy of motion and notice acknowledged, this ..... day of March, 1906.

Attorney for Appellant.

Supreme Court of the United States.

No. 258.

THE NEW YORK FOUNDLING HOSPITAL, *Appellant,*
vs.
JOHN C. GATTI.

Appeal from the Supreme Court of the Territory of Arizona.

TERRITORY OF ARIZONA, } ss.
COUNTY OF MARICOPA. }

Walter Bennett, being first duly sworn, on his oath says: That he is one of the attorneys for the respondent in the above-entitled cause; that on the 5th day of March, 1906, he served

the motion and notice to which this affidavit is attached upon E. S. Ives (at Tucson, in the Territory of Arizona), one of the attorneys of record for the New York Foundling Hospital, petitioner and appellant herein, by then and there delivering to said E. S. Ives a true and correct copy of said notice and motion.

WALTER BENNETT.

Subscribed and sworn to before me this 8th day of March, 1906.

M. W. LORAINE,

[NOTARIAL SEAL] *Notary Public.*

Supreme Court of the United States.

No. 21—October Term, 1906.

The New York Foundling Hospital, Appellant, vs. John C. Gatti. } Appeal from the Supreme Court of the Territory of Arizona.

[December 3, 1906.]

Mr. Justice Day delivered the opinion of the Court.

The suit below was begun by a petition for a writ of *habeas corpus*, by the New York Foundling Hospital, a corporation of the State of New York, against John C. Gatti, to command said Gatti to produce the body of one William Norton, an infant, and to show by what right he held such infant under his custody and control.

The petitioner set out in substance that, by its charter granted by the legislature of New York, it was authorized to receive and keep under its charge, custody and control children of the age of two years or under, found in the city of New York, abandoned or deserted, and left in the crib or other receptacle of petitioner for foundlings, and to keep such children during infancy; that the child William Norton had come to it as a foundling within the terms of its charter; that the petitioner, on the 4th of October, 1901, to October 2, 1904, had the care, charge, custody and management of said child; that on or about the first of October, 1904, petitioner placed the child in the home of a certain person in the town of Clifton, county of Graham, Territory of Arizona, to be held and cared for by the said person in said home temporarily, and at all times subject to the supervision of the petitioner and its officers and agents; that at such time the petitioner had officers and agents of trained experience at the town of Clifton, with instructions to supervise said child and the care and management of it while temporarily in the charge and care of the said person as aforesaid; that at all times the petitioner had the right at will to withdraw the child from the care and charge of the said person and retain the custody thereof, and continue to keep the said child in pursuance of law under its care, charge, custody and management during the term of its infancy as aforesaid.

Upon information and belief it charges that thereafter, and on or about the second day of October, 1904, one John C. Gatti, residing at the said town of Clifton, his servants and employes, unlawfully and with force and violence entered into the house of the said person, where at the time of said unlawful entrance the said child William Norton was, having been

placed there as aforesaid, and forcibly, unlawfully and without right took possession of said William Norton and removed him thence to the custody of the said John Gatti. That the said child has ever since said day been in the custody and under the control of the said Gatti, and that the said child is now restrained of its liberty by the said Gatti, without the consent or license of the petitioner and against its desire, intention and protest, and in violation of its rights under the laws of the State of New York, of the United States and of the Territory.

The respondent made return and claimed to be entitled to the custody of the child named in the petition as the legally appointed guardian, duly qualified as such under letters of guardianship issued by the Probate Court of Graham County, Arizona. And further set forth in the return that the child in question is a white, Caucasian child; that the petitioner on or about the first day of October, 1904, brought the said child to the Territory of Arizona and abandoned him to the keeping of a Mexican Indian, whose name is unknown to the respondent, but one financially unable to properly clothe, shelter maintain and educate said child, and, by reason of his race, mode of living, habits and education, unfit to have the custody, care and education of the child; that said person, to whom petitioner is alleged to have abandoned said child, voluntarily surrendered it to certain persons, who thereupon placed it in the care, custody and control of respondent, who is a fit person for that purpose, and it will be to the best interest of the child that he be permitted to remain with the respondent, whose purpose and intention it is to rear, maintain, educate and provide for said child as though he were his own.

The petitioner traversed the return, and denied that the said minor was in the care, custody and control of the respondent by virtue of letters of guardianship, and alleged that the said minor has been in the care, custody and control of respondent Gatti by force and violence, and without authority of law or of any person legally authorized to place the child in the custody of the respondent.

The case came to trial on the issues of fact raised in the petition, return and traverse thereof by the petitioner, and the testimony having been heard in open court, a final order was made, adjudging the said William Norton to be a minor of the age of two and one-half years, and that his best interests required that the said John C. Gatti have the care, custody and control of said infant, who was thereupon remanded to the care, custody and control of said respondent.

In the view which we take of the jurisdiction of this court to entertain the appeal in this case it is unnecessary to consider the elaborate findings of fact made in the Supreme Court of Arizona as the basis of its order, further than they bear upon the question of jurisdiction to entertain this appeal.

It was found that the children were taken into the Territory by the representatives of the Foundling Hospital, to remain there and be placed in suitable homes in Arizona, but, by imposition practised upon the agents of the society, the children were distributed among persons wholly unfit to be intrusted with them, being, with one or two exceptions, half breed Mexican Indians of bad character. That thereupon a committee was appointed from the citizens resident of the vicinity, who visited the homes of the persons having possession of the children, stating to them that they had been appointed by the American residents to take possession of the children, who were then voluntarily surrendered by such persons. The children were taken charge of by certain good women, and afterwards the child William Norton was given to the respondent, who has since had his care, custody and control. This was done without the consent of the society or its agents. Afterwards letters of guardianship were issued to the respondent by the Probate Court of Graham County, Arizona. The petitioner took an appeal from the order granting the letters of guardianship to the District Court of the county. Pending this appeal the petition for the writ of *habeas corpus* was filed.

The court, acting upon the principle that the best interests of the infant are controlling, awarded the care and custody thereof to the respondent, (79 Pac. Rep. 231,) and the petitioner took an appeal to this court.

The jurisdiction of the Supreme Court of the Territory to issue the writ of *habeas corpus* is not called in question in this case.

We are met at the threshold with an objection to the appellate jurisdiction of this court. The appeal in such cases is allowed under cover of section 1909, Rev. Stat. (*Gonzales* v. *Cunningham*, 164 U. S. 612.) That section provides:

"SEC. 1909. Writs of error and appeals from the final decisions of the Supreme Court of either of the Territory of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming shall be allowed to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decision of the Supreme Courts created by this title, or of any judge thereof, or of the District Courts created by this title, or of any judge thereof, upon writs of *habeas corpus* involving the question of personal freedom."

The question is, therefore, is this a writ of *habeas corpus* "involving the question of personal freedom?" That this section of the statute does not permit appeals from all cases in which the writ is issued is manifest in the use of language in the act, specifically limiting the right of review in this court to cases of writs which involve the question of personal freedom.

A brief consideration of the history and nature of the writ will, we think, make manifest the purpose of Congress in using this restrictive language giving the right of appeal. The writ is usually granted in order to institute an investigation into the illegal imprisonment or wrongful detention of one alleging himself to be unlawfully restrained of his liberty.

The jurisdiction is conferred to enable the cause of restraint to be inquired into, and the person imprisoned or wrongfully deprived of freedom restored to liberty.

The subject was discussed by Mr. Justice Miller in the case of *In re Burrus*, (136 U. S. 586,) in which it was held that a District Court of the United States has no authority to issue a writ of *habeas corpus* to restore an infant to the custody of its father when unlawfully detained by its grandparents.

Appended to that case, and printed by request of the members of the court, is an instructive opinion by Judge Betts, delivered in the case of *In re Barry*, United States Circuit Court for the Southern District of New York, in which he reached the conclusion that a Circuit Court of the United States had no jurisdiction in *habeas corpus* to entertain a controversy as to the custody of a child when the father sought to compel the mother to deliver it to him, a question not decided in *In re Burrus*. In the course of the discussion the learned judge points out the origin of the writ as a means of relief from arrest or forcible imprisonment, and its growth in later use as a means of determining the custody of children:

"There is no reason to doubt that originally the common law writ was granted solely in cases of arrest and forcible imprisonment under color or claim of warrant of law.

"As late as 2 James II, the court expressly denied its allowance in a case of detention or restraint by a private person, (*Rex* v. *Drake*, Comberback, 35 Viner, 213;) and the *habeas corpus* act of Charles II, which is claimed as the Magna Charta of British liberty, has relation only to imprisonment on criminal charges. (3 Bac. Ab. 438, note.)

"It is not important to inquire at what period the writ first was employed to place infant children under the disposal of courts of law and equity. This was clearly so in England, anterior to our Revolution, (*Rex* v. *Smith*, 2 Strange, 982; *Rex* v. *Delaval*, 3 Burrow, 1434; *Blissetts' case*, Lofft. 748;) and the practice has been fully confirmed in the continued assertion of the authority by those courts unto the present day. (*King* v. *Demanneville*, 5 East. 221; *Demanneville* v. *Demanneville*, 10 Ves. 52; *Ball* v. *Ball*, 2 Sim. 35; *Ex parte Skinner*, 9 J. B. Moore, 278; *King* v. *Greenhill*, 4 Ad. & El. 624;) and this indifferently, whether the interposition of the court is demanded by the father or mother. (4 Ad. & El. 624 *ubi sup.*; 9 Moore, 278 *ubi sup.*)

* * * * * *

"The authority to take cognizance of the detention of infants by private persons, not held under claim or color or warrant of law, rests solely in

England on the common law. It is one of the eminent prerogatives of the crown, which implies in the monarch the guardianship of infants paramount to that of their natural parents. The royal prerogative, at first exercised personally *ad libitum* by the King, (12 Pet. 630,) and afterwards for his relief, by special officers, as the Lord High Constable, the Lord High Admiral and the Lord Chancellor, in process of time devolved upon the high courts of equity and law, and in them this exalted one, of allowing and enforcing the writ of *habeas corpus ad subjiciendum*, became vested as an elementary branch of this jurisdiction. In the performance, however, of this high function in respect to the detention of infants by parents, etc., the court or judge still acts with submission to the original principle, out of which it sprang, that infants ought to be left where found, or be taken from that custody and transferred to some other, at the discretion of the prerogative guardian, and according to its opinion of their best interests and safety."

It was in the exercise of this jurisdiction as *parens patriæ* that the present case was heard and determined. It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements. Such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. In such cases the question of personal freedom is not involved except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint. As was said by Sharkey, C. J., in 6 How. (Miss.) 472:

"An infant is not entitled to his freedom, an adult is. When a *habeas corpus* is granted to an adult the object is to inquire whether he is legally restrained of his liberty, because if he is not he must be set free, for the plain reason that by law he is entitled to his freedom. But if the court is also to set the infant free they give him a right to which he is not entitled and deprive the parent or guardian of a right to which he is entitled, to wit, the custody of the infant."

We think that such considerations as these induced Congress to limit the right of appeal to this court in *habeas corpus* cases. The discretionary power, exercised in rendering the judgment, the ability of local tribunals to see and hear the witnesses and the rival claimants for custody of children, induced, in our opinion, the denial of appeal in such cases as the one at bar, as distinguished from those of a different character, where personal liberty is really involved, and release from illegal restraint, a high constitutional and legal right not resting in the exercise of discretion, is sought, in which an appeal is given to this court.

In the present case there was no attempt to illegally wrest the custody of the child from its lawful guardian while temporarily in the Territory of Arizona. The society voluntarily took the child there with the inten-

tion that it should remain. Through imposition the child was placed in custody of those unfit to receive or maintain control over it, and, as above stated, came into the custody and possession of the respondent.

The child was within the jurisdiction of the court under such circumstances that rival claimants of the right of custody might invoke the jurisdiction of a competent court of the Territory to determine, not the right of personal freedom, but to which custodian a child of tender years should be committed. (*Woodworth* v. *Spring*, 4 Allen, 321.)

We do not think that the case comes within the provisions of section 1909, permitting an appeal to this court only in cases involving the question of personal freedom.

The appeal will be dismissed for want of jurisdiction.

Mr. Justice BREWER took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.